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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 375

SAFEWAY TRAILS, INC., *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND THE BALTIMORE AND ANNAPOLIS RAILROAD COMPANY, *Appellees*.

On Appeal From the United States District Court for the District of Columbia

STATEMENT AS TO JURISDICTION

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Rule 15 2

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND THE BALTIMORE AND ANNAPOLIS RAILROAD COMPANY, *Appellees*.

On Appeal From the United States District Court for the District of Columbia

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STATEMENT AS TO JURISDICTION

Appellant (Safeway Trails), plaintiff below, appeals from the judgment of the specially constituted three-judge United States District Court for the District of Columbia, dated June 20, 1959 and entered June 30, 1959, dismissing the complaint of Safeway Trails and entering judgment for the United States of America (United States) and the Interstate Commerce Commission (I. C. C.), defendants below, and for The

Baltimore and Annapolis Railroad Company (Railroad); defendant-intervenor below. Safeway Trails submits this statement in compliance with Rules 13 and 15 of the Revised Rules of the Supreme Court of the United States to show the basis upon which this Court has jurisdiction on direct appeal to review the judgment of the District Court and that the questions presented are substantial.

OPINIONS BELOW

The opinion of the three-judge District Court for the District of Columbia is not yet reported and is annexed hereto as Appendix A. The opinion of division 1 of the I. C. C. is reported at 76 M. C. C. 727;[1] the subsequent opinion of the entire I. C. C. entered upon reconsideration[1] is reported at 79 M. C. C. 123; both opinions are annexed hereto as Appendices B and C respectively. The recommended report of Joint Board No. 120 to the I. C. C., as adopted by division 1, is not reported and is annexed hereto as Appendix D.

BASIS OF JURISDICTION

(i) This suit was initiated in the aforesaid District Court by Safeway Trails pursuant to 28 U.S.C. §§ 1336, 1398, 2284, 2321-2325 to annul and set aside a report and order of the I. C. C. and to enjoin permanently the I. C. C. from issuing thereunder a certificate of public convenience and necessity permitting, *inter alia*, the operation by the Railroad of a common carrier service by motor vehicle in interstate and foreign commerce between Fort George G. Meade, Maryland, and the City of Washington, District of Columbia.

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[1] *The Baltimore and Annapolis Railroad Company Extension — Washington, D. C.*, I.C.C. Docket No. MC-102299 (Sub-No. 7).

(ii) The final judgment of the District Court here sought to be reviewed is dated June 20, 1959 and was entered June 30, 1959. From this final judgment no rehearing was sought. Thereafter, notice of appeal was filed on July 7, 1959, in the United States District Court for the District of Columbia.

(iii) Jurisdiction to review on appeal the final judgment of the District Court is conferred upon this Court by 28 U.S.C. §§ 1253 and 2101(b).

(iv) There are many decisions which sustain the jurisdiction of the Supreme Court to review on direct appeal the judgment of the specially constituted three-judge District Court in this case. Two recent decisions are: *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957); *American Trucking Assos.* v. *United States*, 355 U.S. 141 (1957).

QUESTIONS PRESENTED

1. Whether the District Court correctly construed and applied Section 216(a) and (e) of the Interstate Commerce Act, Part II [49 U.S.C. § 316(a) and (e)], by sustaining the Interstate Commerce Commission for its failure to act upon the through-route proposal of Safeway Trails.

2. Whether the District Court was justified in sustaining the Interstate Commerce Commission for its failure to consider the detrimental effect upon existing motor bus carriers operating in the Washington area by the introduction into the area of additional competition to their charter and special bus operations from The Baltimore and Annapolis Railroad Company, upon the ground that the special and charter rights of Section 208(c) of the Act [49 U.S.C. § 308(c)] are not

severable from a certificate issued under Section 207(a) of the Act [49 U.S.C. § 307(a)] and flow without additional proof of public convenience and necessity.

3. Whether the District Court in sustaining the basic findings of the Interstate Commerce Commission as to the inadequacy of existing service between Washington, D. C. on the one hand and the District Training School and Fort George G. Meade on the other correctly construed and applied the substantial evidence rule as approved in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951) and subsequent pronouncements of the Supreme Court.

STATUTES INVOLVED

The relevant portions of the Interstate Commerce Act involved provide:

Section 208(a)

". . . and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, . . ." 49 U.S.C. § 308(a)

Section 216(a)

"It shall be the duty of every common carrier of passengers by motor vehicle to establish reasonable through routes with other such common carriers and to provide safe and adequate service, equipment, and facilities for the transportation of passengers in interstate or foreign commerce: . . ." 49 U.S.C. § 316(a)

Section 216(e)

". . . and the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, . . ." 49 U.S.C. § 316(e)

STATEMENT OF THE CASE

Safeway Trails is a common carrier of passengers by motor vehicle subject to the provisions of Part II of the Interstate Commerce Act, 49 U.S.C. § 301 et seq., and operates in regular route service generally between the District of Columbia and points as far north as New York City. As part of its scheduled regular route operations, Safeway Trails provides express service between the District of Columbia and the military reservation of Fort George G. Meade, Md., the National Security Agency located within the Fort Meade military reservation, and the District Training School located immediately at the entrance to the Fort Meade reservation. As an adjunct to its regular route operations, Safeway Trails actively is engaged in transporting special and chartered bus parties originating particularly within the District of Columbia.

In addition to providing service to the public over its own lines, Safeway Trails, a member of the National Trailways Bus System, an association of independent bus operators, offers through-route service to almost every part of the country by tacking its certificated authority onto the authority of connecting passenger motor carriers; through-route service is provided in accordance with some 22 agreements with a like num-

ber of bus companies some of which are affiliated with the Trailways association and some of which are not.

The Railroad operates a freight rail line to and from a junction with the Baltimore and Ohio Railroad near Baltimore City and Annapolis, Md. serving intermediate points including Glen Burnie, Md. While it transports no passengers by rail, it does, nevertheless, offer passenger transportation by motor vehicle over several routes duly certificated by the I. C. C. within an area circumscribed generally by Baltimore City to the north, Annapolis to the southeast and Fort Meade to the southwest. Included within the area is the Village of Glen Burnie.

By an application[2] filed pursuant to Section 207(a) of the Interstate Commerce Act, Part II, 49 U.S.C. § 307(a), the Railroad sought to extend its passenger bus operations from Glen Burnie, Md. into the District of Columbia utilizing its existing authority from Glen Burnie to a point immediately north of Fort Meade which, by its application, it sought to extend into Fort Meade and, thence, into the District of Columbia via a route identical to that over which Safeway Trails operates its own Washington-Fort Meade service.

Specifically, the Railroad sought a certificate of public convenience and necessity which would: (1) permit a more direct highway routing than it then held from Glen Burnie into Fort Meade; (2) permit operation over a segment of the Baltimore-Washington Parkway near the National Security Agency installation (NSA) which would provide a more direct route between NSA and the District of Columbia than would

[2] Ibid., p. 2, footnote 1.

be possible by operating through Fort Meade proper; and (3) permit operations through Fort Meade and into the District of Columbia over U. S. Highway No. 1. (1) and (2) principally were sought for the operating convenience of the Railroad, while (3) contained the real substance of the Railroad's application the granting of which would permit the Railroad to operate in direct competition with Safeway Trails between Fort Meade and Washington over a route which at best produces only meager revenues and results frequently in a deficit. In addition, the Railroad made clear its intention to compete with Safeway Trails and other Washington based carriers for special and charter operations originating within the District of Columbia.

Accordingly, Safeway Trails appeared before the I. C. C. to oppose the granting of the Railroad's application. This opposition was in the alternative: (1) public convenience and necessity do not require direct bus service to and from Glen Burnie and the District of Columbia and the entire application should be denied; (2) but if such direct bus service is required, it should be accomplished by tacking the existing Fort Meade-Washington, D. C. authority of Safeway Trails to that of the Railroad via a through-route operation and not by granting to the Railroad authority duplicating that already held by Safeway Trails; (3) that, in any event, the service of Safeway Trails between the District of Columbia and Fort Meade, including NSA and the District Training School, is more than adequate to meet the demands placed upon it which neither require nor economically permit additional service; and, finally, (4) that the introduction of additional special and charter bus competition in the District of Columbia not only is unwarranted but would be detrimental to existing carriers.

Upon the record the I. C. C. found, *inter alia*, (1) that public convenience and necessity require service to and from Glen Burnie and the District of Columbia; (2) that the Railroad refused to join in a through-route operation with Safeway Trails; (3) that the Railroad offered no evidence of need for additional service to NSA and that the existing service of Safeway Trails to that installation is adequate, but that the existing service between Washington, D. C. and Glen Burnie, including that to the District Training School, is patently inadequate; (4) that special and charter rights flow automatically from a grant of a certificate of public convenience and necessity covering a regular route operation, and, therefore, the evidence of record relating to the detriment to existing carriers by additional inroads upon their special and charter operations is immaterial.

Thereafter, upon reconsideration, the I. C. C. by a six to five majority, directed that there issue to the Railroad a certificate of public convenience and necessity permitting the Railroad [(1) supra] to operate a more direct route from Glen Burnie into Fort Meade and [(3) supra] to operate from Fort Meade to and from the District of Columbia. The Railroad was denied authority [(2) supra] to operate over the segment of the Baltimore-Washington Parkway on the ground that the Railroad offered no evidence with respect to its proposed service to NSA.

Thereafter, this suit was brought before a three-judge United States District Court for the District of Columbia. An interlocutory injunction was issued, but upon final submission judgment was entered for defendants following which this appeal was noted.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. The Question on Through-Routes

In and of itself Safeway Trails is a small bus company operating within a limited area along the east coast described by New York City to the north and Washington, D. C. to the south. Within this area it competes with a number of common carriers and particularly with the giant Greyhound Corporation having a continental network of bus routes and seemingly unlimited financial resources. It might be curious that Safeway Trails in this atmosphere is able to survive; it is probably remarkable that it not only survives but enjoys relative prosperity, and today offers to the public the finest of equipment and service not only over its own routes, but through connecting carriers to all parts of the country.

The key to its continued existence and ability to avoid ingestion by its more powerful competitors, including the railroads, is found in Section 216(a) of the Interstate Commerce Act, Part II, 49 U.S.C. § 316(a), which states in the most unambiguous of terms that "... *It shall be the duty of every common carrier of passengers by motor vehicle to establish reasonable through-routes with other such common carriers ...*"

In view of the express statutory language employed by the Congress in drafting Section 216(a) it may not be said that the establishment of through-routes between interstate passenger bus operators altogether is a matter of voluntary undertaking in every instance. Indeed, the language of the statute, when cast against the mandate of the declared National Transportation Policy[3] laid down by the Congress to control the deter-

[3] 54 Stat. 899 (1940); 49 U.S.C.A. prefatory note to § 301, Part II of the Interstate Commerce Act.

minations of the I. C. C., *Interstate Commerce Commission et al.* v. *Parker et al.*, 326 U.S. 60 (1945), serves only to emphasize the purpose of the Congress in enacting this legislation.

To the proposal of the Railroad to operate between Glen Burnie, Md. and Washington, D. C., Safeway Trails offered to join with the Railroad in the creation of a through-route utilizing the certificated authority of the Railroad for operations between Glen Burnie, Md. and Fort Meade, and, thence, via the certificated authority of Safeway Trails into the District of Columbia. The service would be offered to the public without change of bus, and from an operational point of view the service would be identical to that which the Railroad proposed for its sole operation.

The I. C. C. conceived itself to be without jurisdiction to consider the reasonableness of this through-route proposal when raised in a Section 207(a)[4] proceeding and, therefore, largely ignored the proposal of Safeway Trails with the observation made first by the Joint Board:

> "As of the day of the continued hearing, the offer had not been accepted by applicant (Railroad)." (Appendix D, p. 30a)

Next, upon exceptions to the recommended report of the Joint Board, by division 1:

> "There is no evidence to show that this proposal is acceptable to applicant." (Appendix B, p. 11a)

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[4] Section 207(a) Part II of the Interstate Commerce Act, 49 Stat. 551 (1935), 49 U.S.C. § 307(a).

And, finally, upon reconsideration, by a majority of one of the entire Commission, five Commissioners dissenting:

> "This proposal is not acceptable to applicant." (Appendix C, p. 18a)

Safeway Trails, of course, was motivated by a desire to promote safe, adequate, economical and efficient service through the economical and efficient utilization of existing operating certificates, equipment, facilities and personnel. On the other hand, the proposal of the Railroad to duplicate the operation of Safeway Trails is shown by the record, unrefuted by the Railroad, to be calculated not to stimulate new passenger traffic but only to detract from the existing service of Safeway Trails. All of these things and more the I. C. C. could have considered except for its extremely narrow construction of the scope of public convenience and necessity and its implied rejection of the express mandate of Section 216(a) of the Act, 49 U.S.C. § 316(a).

In this era of massive interstate highway construction, declining rail passenger services and stifling passenger motor carrier competition, the agency created by the Congress to regulate the national transportation industry ought not to be permitted, by its own timidity, to shrink from its delegated obligation. As can be demonstrated on brief and argument, the I. C. C. enjoys ample and sufficient jurisdiction over the industry to compel the institution of through-route service in a manner as may be required by public convenience and necessity in a Section 207(a) application proceeding. The refusal of the Commission to consider the obligation of the Railroad to utilize the offer of through routing as an alternative to destructive dupli-

cation of service was legal error beyond the limitations of administrative discretion. The I. C. C. was required by the evidence before it to deny the application or to grant it in part and upon condition of acceptance of Safeway's offer. The opinion of the District Court does little to clarify or settle this problem, which problem because of its importance to the passenger motor carrier industry deserves plenary consideration by this Court.

B. The Question on Special and Charter Bus Operations

Because of the great tourist popularity enjoyed by Washington, D. C., special and charter bus operations originating within the District of Columbia have grown to a valued source of revenue to those bus companies operating out of the Washington area. Indeed, several of these companies are able financially to continue their regular route operations only because of the revenue derived from special and charter operations. The scant likelihood that the Railroad's proposed Glen Burnie-Washington operation will be economically self-sustaining has forced most Washington based bus operators, including Safeway Trails, to conclude the Railroad to be motivated in its desire to operate into Washington, D. C. solely for the purpose of participating in the special and charter revenue the unrestricted grant of its Section 207(a) application would permit. The Railroad concedes that it will compete actively for the existing special and charter business. The I. C. C., again without going into the merits of the evidence and arguments made thereon, expressly concluded itself to be without jurisdiction to limit or otherwise condition a certificate of public convenience and necessity

issued under Section 207(a), Part II of the Act, so as to restrict the Railroad from competing for special and charter business within Washington, D. C. On this ground the I. C. C., on its own motion, rejected as immaterial all evidence relating to the injury to be visited upon existing carriers and their service to the public by inroads thereon anticipated from the Railroad.

The District Court endorsed this interpretation notwithstanding the provisions of Section 208(a) of the Act, 49 U.S.C. § 308(a), which provides in part:

> ". . . and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require . . ."

Both the I.C.C. and the District Court ignored the further argument of Safeway Trails that despite the express provision of Section 208(a), supra, if it were correct that the Congress delegated to the I.C.C. no authority to condition or limit a certificate so as to prevent undue and destructive competition for special and charter business, the Commission must consider evidence of the consequences of the grant upon public convenience and necessity and within the framework of the National Transportation Policy. Cf. *Central Kentucky Bus Lines, Inc., Common Carrier Application*, 61 M.C.C. 581, 585.

With the constantly mounting costs of regular route operations Safeway Trails, together with almost all other passenger motor carriers, looks increasingly toward its special and charter revenues as a means of alleviating deficits produced on some of its less patron-

ized runs. Today approximately 20 per cent of the revenues of Safeway Trails are attributable to its special and charter operations most of which originate within Washington, D. C.

The assumed absence of power of the I.C.C. to limit and restrict special and charter operations performed under a certificate of public convenience and necessity by virtue of Section 208(c) of Part II of the Act, 49 U.S.C. § 308(c), is a problem which has plagued the industry for many years and on which it and the Commission have sought legislative relief. This Court should consider the obligation of the Commission to apply its discretion to the refusal of a certificate if the incidental rights are shown to be destructive.

C. The Sufficiency of the Findings and the Evidence

The I.C.C. specifically found the existing service between Washington, D. C. and the District Training School to be inadequate. The District Court found this finding to be "... based on ample evidence." In so finding, however, the District Court failed to apply the substantial evidence rule as recognized by this Court in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951), in accordance with Section 10(e) of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1009(e), as requiring of the reviewing court a consideration of the whole of the record made before the agency the action of which is the subject of review.

It is quite apparent not only that the I.C.C. failed to consider the evidence of Safeway Trails relating to service between the District Training School and Wash-

ington, D. C., but that the District Court committed the same failure.

The record made before the Joint Board shows that at the first hearing on the Railroad's application, several employees of the District Training School were produced and testified of a need for service between the School's grounds and Washington, D. C. At that time no service operated directly onto the School's grounds, although Safeway Trails did operate past the front entrance to the School and, as the record further shows, had been unsuccessful in its attempt to ascertain from the School authorities the extent of the transportation needs of the School. By their testimony these employees were quite specific as to their need for regular service for three eight-hour work shifts. Accordingly, Safeway Trails instituted service to the School specifically in accordance with the stated need. And at the time of the second and final hearing before the I.C.C., one month later, Safeway Trails was able to demonstrate that any need for service to the School was being fully satisfied by an existing carrier which was ready, willing and able to perform the service under an existing certificate.

Had the District Court considered the service of Safeway Trails against the need for transportation as stated by the Railroad's witnesses, the finding of the I.C.C. as to the inadequacy of the service to the School would have fallen for want of substantial supporting evidence.

As may be demonstrated on brief, the I.C.C. in a Section 207(a) application proceeding, consistently has considered not only the adequacy of existing service, but also the willingness of existing certificated carriers

to increase their service to meet an increase of public need. Only when existing carriers fail or refuse to meet an increased public need will the I.C.C. grant the application of another carrier seeking to provide additional service. The I.C.C. in the instant case has departed from this standard to the detriment of Safeway Trails.

The I.C.C. likewise has authorized the Railroad to operate in direct competition with the existing service of Safeway Trails between Fort Meade and Washington, D. C., although in this instance it failed to make a finding as to the adequacy or inadequacy of the existing service. Had such a finding been made, clearly it would have been without support in the record, for the Railroad offered no evidence relating to or indicating a need for additional service. Indeed, if a need for additional service had been shown, then Safeway Trails would have been quick to increase the quantum of its existing service to fill this need. The grant to the Railroad of authority from Fort Meade was merely an adjunct to its proposed service from Glen Burnie, and the Railroad did not seek to establish a need for additional Fort Meade service. Accordingly, the I.C.C. should have restricted the Railroad against carrying passengers from Fort Meade to Washington. Certainly such a restriction is appropriate when it is realized, as the record demonstrates, that the route in question hardly is sufficient to support one carrier and much less sufficient to support two.

By its arbitrary grant, the I.C.C. has placed Safeway Trails and the Railroad in ruinous competition of the very nature and character which the Interstate Commerce Act expressly was enacted to avoid. Had the I.C.C. and, subsequently, the District Court reflected

this grant against the National Transportation Policy, the application of the Railroad would have been rejected, either by the Commission in the first instance, or upon remand from the District Court.

CONCLUSION

The questions presented by this appeal, particularly those relating to the I.C.C.'s exercise of its control over the institution of through-routes and limitations on charter rights, are substantial and of importance not only to the parties herein but also the industry as a whole. These are questions of first impression for this Court, and, indeed, were so for the District Court. Because of the principles involved and because of the effect of the decision below on Safeway Trails and the unfortunate precedent set by it upon the motor carrier industry, we respectfully ask that probable jurisdiction be noted.

Respectfully submitted,

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September 5, 1959

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1061-59

SAFEWAY TRAILS, INC., *Plaintiff*,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, *Defendants*

and

THE BALTIMORE AND ANNAPOLIS RAILROAD COMPANY, INC., *Defendant-Intervenor*.

Before: WASHINGTON, Circuit Judge, and PINE and HART, District Judges, holding a statutory three-judge court.

WASHINGTON, *Circuit Judge*: This is a suit to set aside an order of the Interstate Commerce Commission, dated March 2, 1959, and served March 13, 1959, granting an application by the Baltimore and Annapolis Railroad Company for a certificate of public convenience and necessity, pursuant to Section 207(a) of the Interstate Commerce Act, added by 49 Stat. 551 (1935), 49 U.S.C. § 307(a) (1952), to transport passengers in interstate commerce by motor vehicle between certain points in Maryland and the District of Columbia.[1] The route starts at Glen Burnie, Maryland, and includes Friendship International Airport, Fort Meade, and the District Training School.

Safeway, the complainant, provides all existing bus service from Washington, D. C., to the National Security Agency, located on the grounds of Fort Meade, and to Fort Meade itself. Its first claim is that the Commission, in awarding the certificate to the Railroad, failed to make a basic finding that the existing service to these points is

[1] ICC Docket No. MC-102299.

inadequate. It's further claim is that there was insufficient evidence on the whole record to support the Commission's finding of inadequate service to the District Training School, which Safeway also serves. Finally, although Safeway does not provide service to Friendship International Airport, it claims that the existing service by limousine to Friendship is adequate, and that the Commission made no finding to the contrary.

The needs for service to the mentioned points were all the subject of testimony and were carefully considered by the Commission. Certainly, Safeway has no grievance concerning the National Security Agency, since it is clear that the Commission specifically declined to permit the Railroad to service the Agency. As to the other points served, we think that the Commission's basic finding that the existing service "between Washington and Glen Burnie, including that to the District Training School, is patently inadequate,"[2] when read with the reports of Joint Board No. 120 and Division 1 of the Commission, see 76 M.C.C. 727 (1958), is sufficient to comply with the requirements of law, and is based on ample evidence.

Safeway further urges that this court set aside the order because the Commission acted contrary to the mandate of Section 8(b) of the Administrative Procedure Act, 60 Stat. 242 (1946), 5 U.S.C. § 1007(b) (1958), in failing to make specific findings as to the competitive effect the grant of the certificate would have on Safeway. There is no indication from the record before us, however, that the petitioner's present demand for specific findings on this subject was ever urged before the Joint Board, the Division, or the Commis-

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[2] The Commission went on to state that—.

"'[P]assengers on public vehicles are subjected to inconvenient, time-consuming, and sometimes expensive interchanges, and prospective passengers are discouraged from using the existing public transportation services. On the other hand, a rather widespread desire for the proposed service exists."

sion.[3] This court is therefore not required to consider the issue. Further, the need for specific and detailed findings must depend on the nature of the record before the court for review and the clarity with which the Commission presents the factual basis for its ultimate conclusions. See *Capital Transit Co.* v. *United States*, 97 F. Supp. 614, 621 (D.D.C. 1951). Compare *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 531-32 (1946), with *Clarke* v. *United States*, 101 F. Supp. 587, 590-91 (D.D.C. 1951). In the present case, the opinions of the Joint Board, Division 1, and the Commission, when read with the ultimate decision that the grant was required by the public convenience and necessity; cf. *United States* v. *Pierce Auto Freight Lines, Inc., supra*, were sufficient to obviate the need for detailed findings as to the competitive effect which the grant of the certificate would have, at least in the absence of a showing that such findings were requested and refused, to the prejudice of the complainant. Cf. *Greensboro-High Point Airport Authority* v. *Civil Aeronautics Board*, 97 U.S. App. D.C. 358, 231 F. 2d 517 (1956).

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[3] The Commission in its opinion enumerates only the following points of contention raised by Safeway and Greyhound in their petitions for reconsideration:

> "In their respective petitions Safeway and Greyhound contend that the Division erred (1) in finding a public need for the proposed service, (2) in finding present interchange arrangements unsatisfactory, (3) in finding that applicant is not in the position of a new entrant into a competitive field, (4) in finding that a need has been shown for the proposed operation, incidental charter rights notwithstanding, (5) in failing to find that deficiencies in the existing service can be eliminated by joint through-service with Safeway and applicant or by a connecting line service with Greyhound and applicant, (6) in failing to find that the proposed service would be uneconomical, and (7) in disregarding the resulting competitive effect on the charter and special operations of carriers in the Washington area."

As a third point, Safeway contends that the Commission erred in not ordering the Railroad to accede to Safeway's request, made in the course of the proceeding, that a joint through route be established from Glen Burnie to Washington. Safeway contends that Section 216(a) of the Act, added by 49 Stat. 558 (1935), 49 U.S.C. § 316(a) (1952), imposes a duty on "every common carrier of passengers by motor vehicle to establish reasonable through routes with other such common carriers . . . ." But such a duty is not absolute, see *Crown Coach Co.* v. *United States*, 44 F. Supp. 547, 550 (W.D. Mo. 1942), and is subject at least to a determination of what is reasonable under the circumstances, see *Wolzinger* v. *Burlington Transportation Co.*, 43 M.C.C. 51, 53 (1943). The appropriate and usual procedure to bring about the establishment of such a through route is by a complaint filed under Section 216(e) of the Act, added by 49 Stat. 558 (1935), 49 U.S.C. § 316(e) (1952).[4] But in the present case no complaint was filed under Section 216(e); rather Safeway's request was raised as a defense in the Section 207(a) proceeding in order to defeat the grant of the certificate to the Railroad. The Commission has never required the institution of through routes under such circumstances. We think it was well within its authority and discretion in declining to consider Safeway's re-

[4] Section 216(e) provides in part as follows:

> "[T]he Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maxima or minima, or the maxima and minima, to be charged, and the terms and conditions under which such through routes shall be operated . . . ."

quest in detail, and in granting the operating authority to the Railroad to establish its own service.[5]

Safeway's final objection relates to the Commission's failure to consider the harmful competition to the charter and other special bus operations already existing in the Washington area which would follow from the present grant. The Commission takes the position that chartering privileges are incidental to a grant of regular route authority under Section 207(a) and arise automatically under Section 208(c) of the Interstate Commerce Act, added by 49 Stat. 552 (1935), 49 U.S.C. § 308(c) (1952).[6] Safeway contends that the Commission should have restricted the grant to the Railroad so as to bar it from the charter business. Although it is true that Section 208(a) of the Act, added by 49 Stat. 552, 49 U.S.C. § 308(a) (1952), allows the Commission to attach "to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require," the fact remains that, as early

[5] Safeway itself recognizes the difficulties involved in raising a through route proposal in a Section 207(a) proceeding. In its brief it states:

> "Under the complaint procedure of Section 216(e) of the Act, 49 U.S.C.A. § 316(e), the complaining carrier which seeks to compel through routing with a connecting carrier must sustain the burden of establishing public convenience and necessity. Obviously the complaint procedure would be out of place in the instant situation where it is the Railroad which argues for the existence of public convenience and necessity while Safeway, on the other hand, argues against their existence."

[6] Section 208(c) provides:

> "Any common carrier by motor vehicle transporting passengers under a certificate issued under this chapter may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed."

as 1937, Section 208(c) was interpreted to be a mandatory provision granting the Commission no authority to place any limitation in a certificate which would restrict charter privileges. *Peninsula Transit Corporation Common Carrier Application*, 1 M.C.C. 440, 442 (1937). In the 1941 *Regulations Governing Special or Chartered Party Service*, 29 M.C.C. 25, 46, the Commission reaffirmed that "Section 208(c) . . . confers an additional right, *without proof, and which is not severable*, to carriers operating over a regular route or routes and between fixed termini . . . ." (Emphasis added.) The Commission also adhered to this interpretation in *The Baltimore & A. R.R. Extension—Fort George G. Meade*, 63 M.C.C. 357, 366 (1954), as well as in the present case. Thus, for close to a quarter century, the Commission had consistently interpreted Section 208(c) as a mandatory provision. This interpretation, the parties inform us, has been made known to the Congress. We are satisfied that the Commission's interpretation is a reasonable one within the scope of the power and discretion conferred by the governing statute. Cf. *Gray* v. *Powell*, 314 U.S. 402 (1941). Under the circumstances, this court will not now consider whether some other construction of Section 208(a) would be permissible.

Having reviewed the administrative record, including the recommended report of the Joint Board, the report of Division 1 of the Commission, and the report of the Commission, as well as the testimony taken in the proceedings, we are satisfied that the Commission did not exceed its authority, and had a rational basis for its action, when it granted the Railroad's application. For these reasons, the injunctive relief sought will be denied, and the complaint will be dismissed.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

No. MC-102299 (SUB-No. 7)

THE BALTIMORE & ANNAPOLIS RAILROAD COMPANY

EXTENSION—WASHINGTON D. C.

Decided June 13, 1958

Public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle of passengers and their baggage, and of express and newspapers, in the same vehicle with passengers, (1) between Washington, D. C., and Fort George G. Meade, Md., and (2) between junction Maryland Highways 175 and 713 and junction Maryland Highways 170 and 176 at or near Harmans, Md., over described regular routes. Issuance of a certificate approved upon compliance by applicant with certain conditions and application in all other respects denied.

Report of the Commission

Division 1. Commissioners Hutchinson, Walrath, and Goff

By DIVISION 1:

Exceptions to the order recommended by the joint board were filed by opposing motor carriers, and applicant and one exceptant replied.

By application filed January 10, 1957, as amended, The Baltimore and Annapolis Railroad Company of Baltimore, Md., seeks a certificate of public convenience and necessity authorizing operation as a common carrier by motor ve-

hicle of passengers and their baggage, express, mail, and newspapers, in the same vehicle with passengers, (1) between Washington, D. C., and Fort George G. Meade, Md., from Washington over U.S. Highway 1 to Laurel, Md., thence over Maryland Highway 602 to Fort George G. Meade, serving all intermediate points except those between Washington and Laurel, including Laurel, (2) between junction Baltimore-Washington Expressway and Maryland Highway 602 and Fort George G. Meade, from said junction over Baltimore-Washington Expressway, hereinafter called the Expressway, to a junction unnumbered highway, thence over the unnumbered highway to Fort George G. Meade, serving all intermediate points, and (3) between the junction of Maryland Highways 175 and 713 and the junction of Maryland Highways 170 and 176 at or near Harmans, over Maryland Highway 713 to its junction with Maryland Highway 176, thence over Maryland Highway 176 to its junction with Maryland Highway 170, and return over the same routes, serving all intermediate points. The Baltimore Association intervened in support of the application. W. M. A. Transit Company, The Gray Line Inc., Suburban Transit Company, Eastern Greyhound Lines, and Safeway Trails, Inc., hereinafter called Transit, Gray, Suburban, Greyhound, and Safeway, respectively, oppose the application.

The board recommended that applicant be authorized to transport passengers and their baggage, and express and newspapers in the same vehicle with passengers, over routes (1) and (3) above, serving the intermediate points sought, and restricted as indicated in the findings herein. In separate exceptions the several opposing carriers contend that the board erred in not finding the services of existing carriers adequate and in recommending that the application be granted in part. They contend that the real intent of the application is to obtain the incidental charter rights at Washington, and they fear that the introduction of another carrier in the area would detrimentally affect

their revenues. Greyhound asserts that any need in the area can be served by granting applicant authority to operate between Glen Burnie and Laurel. In reply to the exceptions filed by Greyhound, Safeway contends that the suggestion that applicant be granted certain limited authority is without merit and should not be considered. In its reply to the exceptions filed by protestants, applicant contends that the record amply supports the board's findings and should be approved.

The evidence adduced, the board's recommendation, the exceptions, and the replies have been considered. We find the board's statement of fact to be accurate, and that statement is adopted as our own. No exceptions were filed with respect to the recommended partial denial of the application, which is supported by the evidence, and will not be further considered.

Applicant is presently authorized to conduct operations as a common carrier by motor vehicle transporting passengers and their baggage between Baltimore and Annapolis, Md., over a net work of routes serving all intermediate points, including among others, Fort Meade and Glen Burnie, Md. It also holds intrastate authority over these routes, including the segment of the proposed route between Laurel and Fort G. Meade over Maryland Highway 602. Applicant owns 55 buses of which 10 would be made available for the proposed operation. Terminals are maintained at Baltimore, Glen Burnie, Annapolis, and Fort George Meade, Md. Its balance sheet as of December 31, 1956, shows total assets of $3,040,096, including current assets of $197,531; its current liabilities were $191,693; capital stock and capital liabilities $1,103,056, and surplus $671,472. Its net income after income taxes was $20,637.

The Director of Aviation for the city of Baltimore, the Supervisor of Public and Community Relations for Baltimore plants of Westinghouse, the city sales manager of Delta Air Lines, and president of the Association of Sched-

uled Air Lines of Baltimore, several residents of Washington and Glen Burnie who either work at establishments in the affected area or have occasion to seek public transportation there, two officials of the District Training School, and a representative of the Glen Burnie Civic Association were among the principle witnesses who appeared in support of the application. Their testimony was exhaustively detailed in the board's report and will be only briefly summarized herein. The witnesses who reside in Washington and work at the District Training School, situated on Maryland Highway 602 about 4 miles east of Laurel, complain of the service presently available. They presently use Greyhound to Laurel and a school bus to complete their journey. If they miss this connection at Laurel they must take a taxi at additional expense. Five individuals residing in Glen Burnie would use the proposed service on trips to Washington from 1 to 4 times a month. In the past, three of these individuals have made the same trip by bus to Baltimore, thence either by bus or train to Washington. They would prefer the proposed direct service.

Safeway holds a certificate authorizing the transportation of passengers and express and newspapers in the same vehicle with passengers between Washington and Fort George G. Meade via Laurel, serving all intermediate points except those in the Washington commercial zone. It operates three daily schedules between Washington and the District Training School, leaving Washington at 5:30 a. m., 1:35 p. m., and 9:50 p. m., daily and 1:15 p. m., on Sunday, and returning to Washington, buses leave at 7:15 a. m., 3:20 p. m., and 11:30 p. m., daily, and 4:15 p. m., on Sunday. Buses leave Washington for Fort Meade at 2:15 a.m., 8:45 a.m., and 2:15 p.m. On return to Washington the buses' departure from Fort Meade is 8:15 a.m., and 10:15 a. m. One schedule was inaugurated after the first day of hearing in this proceeding and prior to the continued hearing. It operates between Washington and the National Security Agency, located on the Fort Meade

military reservation just off the Expressway on Savage Road, leaving Washington at 6:45 and 7:15 a. m., and 3:15 p. m., and on return to Washington departure time is 8 a. m., and two schedules at 4:40 p. m.

On April 11, 1957, between the initial and continued hearings in this proceeding, Safeway proposed to applicant that a joint through one-bus operation be inaugurated for the transportation of interstate passengers between Glen Burnie and Washington, using the route of applicant between Glen Burnie and Fort George G. Meade and its route to Washington. There is no evidence to show that this proposal is acceptable to applicant.

Transit holds appropriate authority and provides a regular bus passenger service, between Washington, and several terminal points in Maryland, none of which is involved in this application. It operates both regular-route and charter service, and about one-third of its total revenue is derived from the latter service, which is profitable. However, in its overall operations, it had a loss of about $10,000 for the year 1956. Schedules are being eliminated or revised in an endeavor to realize a profit for 1957.

Greyhound, so far as pertinent, is authorized and provides a passenger bus service between Washington and Baltimore both over U. S. Highway 1 and the Expressway, serving all intermediate points. It operates 36 schedules daily over the Expressway and 40 over U. S. Highway 1. It has a commission agent at Laurel and the office is open from 7 a. m. to 11 p. m. Its representative believes that Greyhound would be willing to coordinate its schedules with applicant's proposal at Laurel for through service to Washington in much the same manner suggested by Safeway. It opposes the application because of the possibility that applicant would institute a through operation between Washington and Baltimore; that the proposed service would also increase the competition between Washington and Laurel; and that in addition it would result in additional charter service being authorized at Washington.

It has no objection to applicant being authorized to operate between Laurel and Glen Burnie.

Surburban is authorized to transport passengers and their baggage, and express and newspapers in the same vehicle with passengers, between Washington, on the one hand, and, on the other, several points in Maryland, including Sandy Springs, College Park, and Rockville. It owns 37 buses which are used in its overall service, and approximately 15 percent of its gross revenue is derived from charter operations. Without the latter revenue this carrier would have to curtail some of its regular-route service.

Gray holds authority to transport passengers and their baggage (1) between Washington and several racetracks at nearby Maryland points, over irregular routes, and (2) in special operation and one-way charter operation from and to Washington, over irregular routes. Protestant operates 52 buses in conducting the above operations. About 10 percent of its revenue is obtained from charter operations. It operated at a loss in 1956 and believes that another carrier in competition would cause a diversion of traffic and result in a greater loss in the future.

As seen, a number of persons have been experiencing difficulties in obtaining direct transportation to and from the points involved herein even though the distances between these points are relatively short and in most cases can actually be considered of a local nature. Interchange arrangements in such situations are unsatisfactory. It should be observed that applicant is well established as a passenger carrier, and is not in the position of new entrant into a competitive field. The proposal is clearly designed to satisfy an evident public need. Those persons in the Glen Burnie area would definitely benefit from a direct service to Washington, as it would eliminate their need to make connections in Baltimore. Passengers originating in Washington would also benefit from this direct service. Protestants' contentions with regard to the incidental charter rights that will accrue to applicant at Washington

through a grant of the instant application are without merit. A need has been clearly shown for a grant of the authority as recommended by the board, incidental charter rights notwithstanding.

We find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle of passengers and their baggage, and of express and newspapers in the same vehicle with passengers, (1) between Washington, D. C., and Fort George G. Meade, Md., from Washington over U. S. Highway 1 to Laurel, thence over Maryland Highway 602 to Fort George G. Meade and return over the same route, serving all intermediate points except those between Washington and Laurel, Md., including Laurel and (2) between the junction of Maryland Highways 175 and 713 and the junction of Maryland highways 176 and 170 at or near Harmans, Md., from the junction of Maryland Highway 175 and 713 over Maryland Highway 713 to its junction with Maryland Highway 176 thence over Maryland Highway 176 to its junction with Maryland Highway 170 at or near Harmans, and return over the same route, serving all intermediate points, restricted against the transportation of passengers originating at Baltimore and destined to Washington or originating at Washington and destined to Baltimore; that applicant is fit, willing and able properly to perform the proposed service and to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder; that a certificate authorizing such operation should be granted; and that the application in all other respects should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act and with our rules and regulations thereunder, an appropriate certificate will be issued.

An appropriate order will be entered.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

No. MC—102297 (SUB-NO. 7)

THE BALTIMORE & ANNAPOLIS RAILROAD COMPANY
EXTENSION—WASHINGTON, D.C.

Decided March 2, 1959

On reconsideration, findings in prior report, 76 M.C.C. 727, affirmed. Public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle of passengers and their baggage, and of express and newspapers, in the same vehicle with passengers, (1) between Washington, D.C., and Fort George G. Meade, Md., and (2) between junction Maryland Highways 175 and 713 and junction Maryland Highways 170 and 176 at or near Harmans, Md., over described regular routes. Issuance of a certificate approved upon compliance by applicant with certain conditions, and application in all other respects denied.

Report of the Commission on Reconsideration

BY THE COMMISSION:

By application filed January 10, 1957, as amended, The Baltimore and Annapolis Railroad Company of Baltimore, Md., seeks a certificate of public convenience and necessity authorizing operation as a common carrier by motor vehicle of passengers and their baggage, express, mail, and newspapers, in the same vehicle with passengers, (1) between Washington, D.C., and Fort George G. Meade, Md., from Washington over U.S. Highway 1 to Laurel, Md., thence over Maryland Highway 602 to Fort George G. Meade,

serving all intermediate points except those between Washington and Laurel, including Laurel, (2) between the junction of Baltimore-Washington Expressway and Maryland Highway 602 and Fort George G. Meade, from said junction over Baltimore Washington Expressway to the junction of unnumbered highway, thence over unnumbered highway to Fort George G. Meade, serving all intermediate points, and (3) between the junction of Maryland Highways 175 and 713 and the junction of Maryland Highways 170 and 176 at or near Harmans, Md., over Maryland Highway 713 to its junction with Maryland Highway 176, thence over Maryland Highway 176 to its junction with Maryland Highway 170, serving all intermediate points and return over the same routes. The Baltimore Association intervened in support of the application. W.M.A. Transit Company, The Gray Line, Inc., Suburban Transit Company, Eastern Greyhound Lines, and Safeway Trails, Inc., hereinafter called Transit, Gray, Suburban, Greyhound, and Safeway, respectively, oppose the application.

In the prior report herein, 76 M.C.C. 727, division 1 granted applicant authority to transport passengers and their baggage and express and newspapers, over certain regular routes, (1) between Washington and Fort Meade, and (2) between the junction of Maryland Highways 175 and 713 and the junction of Maryland Highways 176 and 170 at or near Harmans, serving all intermediate points on the latter route and those east and north of Laurel on the former. The effect of this grant of authority when combined with applicant's other authority is to enable it to operate between Washington and Glen Burnie, Md. The authority granted was restricted against the transportation of passengers by applicant between Washington and Baltimore and against the picking up or discharging of passengers at points intermediate between Washington and Laurel, including Laurel. Upon consideration of the record, of the petitions of Safeway and Greyhound, and

applicant's reply thereto, we reopened the proceeding for reconsideration on the present record.

In their respective petitions Safeway and Greyhound contend that the division erred (1) in finding a public need for the proposed service, (2) in finding present interchange arrangements unsatisfactory, (3) in finding that applicant is not in the position of a new entrant into a competitive field, (4) in finding that a need has been shown for the proposed operation, incidental charter rights notwithstanding, (5) in failing to find that deficiencies in the existing service can be eliminated by joint through service with Safeway and applicant or by a connecting line service with Greyhound and applicant, (6) in failing to find that the proposed service would be uneconomical, and (7) in disregarding the resulting competitive effect on the charter and special operations of carriers in the Washington area. They argue that the sole purpose of the application is to obtain incidental charter rights from Washington, and Safeway urges that oral argument be held so that the Commission may announce a policy in regard to charter rights consistent with its legislative proposals to eliminate incidental charter rights.

The facts of record are adequately set forth in the prior report and will be restated here only to the extent necessary for a clear understanding of the issues. Applicant was formerly engaged as a passenger carrier by rail between Glen Burnie and Washington. This service was discontinued many years ago. As here pertinent, it is authorized to conduct operations as a common carrier by motor vehicle, transporting passengers between Baltimore and Annapolis, over a network of routes serving intermediate points including, among others, Fort George G. Meade and Glen Burnie. It also holds intrastate authority over these routes including that segment of the proposed route between Laurel and Fort Meade over Maryland Highway 602. Applicant also operates a rail line limited to the movement

of general freight between Baltimore and Annapolis. If the authority sought is granted, applicant would provide through service between Washington and Glen Burnie with service at all intermediate points between Laurel and Glen Burnie including Fort George G. Meade, the National Training School, and the National Security Agency, all within the Fort Meade Government reservation, with a total running time of about 1.5 hours. Its schedules would be timed to serve the intermediate points to the best advantage of the traveling public.

The application with reference to Glen Burnie, is supported by three civic associations, the Glen Burnie Park and Civic Association, the Chamber of Commerce of Glen Burnie and the Glen Burnie Improvement Association. These associations, totaling about 1,500 members in all, each adopted resolutions in support of the application. In addition, seven individuals each testified as to their desire for a through bus service between Glen Burnie and Washington. Each of these individuals has had occasion to travel to Washington, using either public or private transportation. The former entails a circuitous route north to Baltimore and thence southwest to Washington. Those using public transportation object, primarily, to the required transfer in Baltimore from applicant's vehicles to a bus or train, involving either a walk of several blocks or the additional expense of taxi fare between terminals. Those using private vehicles appear to be desirous of using public transportation but are reluctant to use the existing service with its need to interchange at Baltimore. Applicant's ticket agent at Glen Burnie receives an average of one or two requests daily for tickets to Washington, but these must be refused because through service is not offered by applicant and the agent is unable to sell joint-line tickets.

Evidence as to the other proposals included in the subject application dealt mainly with the need for service between Washington, on the one hand, and, on the other,

Friendship Airport and the District Training School. With respect to this latter institution, located on Maryland Highway 602 about 4 miles east of Laurel, a number of employees have a daily need for bus service to and from Washington. These employees, who presently utilize Greyhound's service to Laurel, must connect at Laurel with a schoolbus from the institution which transports them free of charge to the school. Occasions repeatedly arise in which the Greyhound bus fails to make the connection with the school shuttle, forcing these workers to take a taxi for the remaining distance. There are about 1,100 children at the school. Visiting hours are on Sundays and Holidays from 1 p.m. to 4 p.m. Inasmuch as visitors are not allowed to use the schoolbus, which is available to employees only, applicant, at the request of school officials, has been operating one schedule from Laurel to the school on Sunday afternoons to accommodate such visitors.

Safeway is authorized to transport passengers and express and newspapers in the same vehicle with passengers between Washington and Laurel and between Laurel and Fort George G. Meade, serving all intermediate points except those in the Washington commercial zone. It also operates between Washington and the National Security Agency. Between the initial and continued hearings of this application, Safeway proposed to applicant that a joint through one-bus operation be inaugurated for the transportation of interstate passengers between Glen Burnie and Washington, using applicant's route between Glen Burnie and Fort Meade and Safeway's route between Fort Meade and Washington. This proposal is not acceptable to applicant.

Greyhound, as here pertinent, is authorized and provides passenger-bus service between Washington and Baltimore, over both U.S. Highway 1 and the Baltimore-Washington Expressway, serving all intermediate points. It also suggests a through service be instituted with applicant similar

to that proposed by Safeway. Transit, Gray, and Suburban all address the brunt of their opposition to the incidental charter rights which applicant would acquire under section 208(c) of the Interstate Commerce Act if it acquires authority to operate from Washington.

A reexamination of the record in the light of petitioners' arguments leads us to come to the same conclusion as that reached by division 1. The existing service between Washington and Glen Burnie, including that to the District Training School, is patently inadequate. Although the distances involved are rather short, at most 40 miles, passengers on public vehicles are subjected to inconvenient, time-consuming, and sometimes expensive interchanges, and prospective passengers are discouraged from using the existing public transportation services. On the other hand, a rather widespread desire for the proposed service exists. In addition to the witnesses who testified with respect to their need for the proposed service, applicant's ticket agent at Glen Burnie has continually received requests for tickets to Washington by prospective customers who were under the impression that such a service existed. As for the existing service between Washington and the District Training School, in spite of a relatively short distance, about 22 miles; passengers must transfer at Laurel for transportation to the school. Connections at Laurel are not always effected, which results in undue loss of time and inconvenience, in addition to the expense of taking a taxi for the remaining 4 miles to the school. We are satisfied, therefore, that the proposed service to the extent indicated in our findings, would fulfill a demonstrated need for such service.

We find no merit to petitioners' argument concerning the incidental charter rights which applicant would receive under section 208(c) of the act as a result of any grant of authority here. Applicant has met its burden of proof establishing a need for the service indicated in our findings

and is entitled to appropriate operating authority. The fact that applicant receives the incidental charter right mandatory under section 208(c) of the act is immaterial to the issues involved here. Compare *Baltimore & A. R. Co. Extension—Fort George G. Meade*, 63 M.C.C. 357, 365. Despite our legislative recommendations, which if enacted would alter the law regarding charter rights, until such enactment, charter rights are incidental to a grant of regular route authority, and section 208(c) of the act as presently constituted governs the matters. Consequently, the contentions to the contrary must be rejected.

One other matter remains for our consideration. As seen applicant, in addition to holding the above-described operating rights as a motor common carrier of passengers, is engaged in rail-freight operations between Baltimore and Annapolis. It is long established that a railroad or its affiliates shall not be authorized to engage in motor-carrier operations, as such, unless it can be shown that such operations will not unduly restrain competition. Here, although applicant is a railroad it does not transport passengers by rail. It has held independent motor-carrier authority for the transportation of passengers for many years, and there is no evidence of record that such operations have been adverse to the public interest. Moreover, in some respects the authority granted herein is a mere extension of such operations. Accordingly, we have no reason to believe that a grant of authority here will unduly restrain competition or otherwise be contrary to the public interest.

On reconsideration, we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle of passengers and their baggage, and of express and newspapers in the same vehicle with passengers, (1) between Washington, D.C., and Fort George G. Meade, Md., from Washington over U.S. Highway 1 to Laurel, thence over Maryland Highway 602 to Fort George

G. Meade and return over the same route, serving all intermediate points except those between Washington and Laurel, Md., including Laurel and (2) between the junction of Maryland Highways 175 and 713 and the junction of Maryland Highways 176 and 170 at or near Harmans, Md., from the junction of Maryland Highways 175 and 713 over Maryland Highway 713 to its junction with Maryland Highway 176 thence over Maryland Highway 176 to its junction with Maryland Highway 170 at or near Harmans, and return over the same route, serving all intermediate points, restricted against the transportation of passengers originating at Baltimore and destined to Washington or originating at Washington and destined to Baltimore; that applicant is fit, willing, and able properly to perform the proposed service and to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder; that a certificate authorizing such operations should be granted; and that the application in all other respects should be denied.

Upon compliance by applicant with the requirements of sections 215, 217, and 221(c) of the act and with our rules and regulations thereunder, an appropriate certificate will be issued.

An appropriate order will be entered.

COMMISSIONER MURPHY, whom COMMISSIONERS MITCHELL, MCPHERSON, and WEBB join, dissenting:

In my opinion this application should be denied in its entirety. While it may well be that there is a need for an improved service between certain points on the applicant's routes and Washington, the present service deficiencies appear to stem entirely from a lack of coordination between applicant's schedules and those of existing carriers which results from a failure to cooperate for which applicant is at least as much responsible as protestants. The protestants assert that they are entirely willing to cooperate with appli-

cant to the extent necessary to remedy this situation, and I see no reason for doubting their sincerity. Under these circumstances, there is no justification for granting this applicant the authority sought in this proceeding which in additional to extending its local operations to Washington will permit if to compete with existing carriers between the Baltimore area and Washington and in charter operations out of the latter point.

COMMISSIONER FREAS dissents.

APPENDIX D

INTERSTATE COMMERCE COMMISSION

No. MC—102299 (SUB-NO. 7)

THE BALTIMORE AND ANNAPOLIS RAILROAD COMPANY
EXTENSION—WASHINGTON, D.C.

Public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, of passengers and their baggage, and of express and newspapers in the same vehicle with passengers, (1) between Washington, D. C., and Fort George G. Meade, Md., from Washington over U.S. Highway 1 to Laurel, Md., thence over Maryland Highway 602 to Fort George G. Meade, and return over the same route, serving specified intermediate points, and (2) between junction Maryland Highways 713 and 175 and Junction Maryland Highways 176 and 170 over Maryland Highways 713 and 176, serving all intermediate points, and return over the same route. Issuance of a certificate approved upon compliance by applicant with certain conditions and application in all other respects denied.

Report and Order Recommended by Joint Board No. 120, Composed of Norman B. Belt of the District of Columbia and Joseph S. A. Giardina of Maryland

By application filed January 10, 1957 as amended, The Baltimore and Annapolis Railroad Company of Baltimore, Md., seeks a certificate of public convenience and necessity authorizing operation as a common carrier by motor vehicle of passengers and their baggage, express, mail, and newspapers in the same vehicle with passengers, (1) between Washington, D. C., and Fort George G. Meade, Md., from Washington over U. S. Highway 1 to Laurel, Md., thence over Maryland Highway 602 to Fort George G.

Meade serving all intermediate points except those between Washington and Laurel including Laurel and (2) between junction Baltimore-Washington Express Way and Maryland Highway 602 and Fort George G. Meade from said junction over Baltimore-Washington Express to junction unnumbered highway thence over unnumbered highway to Fort George G. Meade serving all intermediate points and (3) between junction Maryland Highways 175 and 713 and junction Maryland Highways 170 and 176 at or near Harmans over Maryland Highway 713 to junction Maryland Highway 176 thence over Maryland Highway 176 to junction Maryland Highway 179 and return over the same routes serving all intermediate points.

The application was referred to joint board No. 120 for hearing and the recommendation of an appropriate order thereon. Hearing was held March 12, 1957 and May 7, 1957 at Washington, D. C. The Baltimore Association of Commerce intervened in support of the application. W.M.A. Transit Company, The Grey Line Inc., Suburban Transit Company, Eastern Greyhound Lines and Safeway Trails, Inc., oppose the granting of the application.

Applicant holds authority to transport passengers and their baggage and express mail and newspapers in the same vehicle with passengers (1) between Baltimore and Fort George G. Meade, Md., over specified routes serving all intermediate points and (2) between Glen Burnie, Md., and junction U. S. Highway 301, and Maryland Highway 176 over U.S. Highway 301, serving all intermediate points, and other authority not here pertinent. It also has intrastate authority over these routes including the proposed route between Laurel and Fort George G. Meade over Maryland Highway 602. Applicant owns 55 buses of which 10 would be made available for the proposed operation. Terminals are maintained at Baltimore, Glen Burnie, Annapolis and Fort George G. Meade, Md. If the author-

ity sought is granted, applicant would provide through service between Washington and Glen Burnie with service at all intermediate points between Laurel and Glen Burnie including Fort George G. Meade, The National Training School, and National Security Agency, all within the government reservation with running time of one hour and 30 minutes. There would be four buses daily between Washington and Glen Burnie. There are three shifts of employees at the District Training School: 6:30 a.m., 2:30 p.m., and 10:45 p.m. No schedules have been worked out as yet but they would be timed to serve intermediate points to the best advantage of the traveling public to and from points on the route. Applicant would have no objection to a restriction against performing a through service between Baltimore and Washington.

The Director of Aviation for the city of Baltimore has complete charge of the administration of Friendship Airport located south of Baltimore and about two miles west of Glen Burnie. Witness has received several hundred inquiries of available bus service from the airport to Washington during the first two and one half months of 1957. There is no dependable scheduled bus service between these points. Admittedly, however, Air Line Limousine, Inc., supported by the air lines, presently transports passengers to and from Washington on a nonscheduled basis. Witness expressed the opinion that the proposed operation, serving intermediate points between the airport and Laurel, would be better than no scheduled service to Washington. None of the 60 employees at the airport resides in Washington so any potential customers using the proposed service would most likely be passengers arriving or departing from the airport.

The Supervisor of Public and Community Relations for Baltimore Plants of Westinghouse appeared in support of the application for the company. Westinghouse has a plant on Fort George G. Meade road near the airport

consisting of two buildings where 6,200 employees engaged in the manufacture of defense materials. There are approximately 3,500 automobiles at the plant daily and a survey shows that there are less than two passengers per car. They seeks employees from wherever obtainable, including Washington. The industrial department offers assistance to employees in getting rides to and from the plant. There are 173 employees in car pools but witness could not give a breakdown of the figures to show the number of employees who reside in Washington. Witness does not know of a need for the proposed service between the plant and Washington.

The City Sales Manager of Delta Air Lines and also President of the Association of Scheduled Air Lines of Baltimore, consisting of seven air lines that use the Friendship Airport supports the proposed service to and from Washington. The proposed service would be too slow for a majority of passengers but a few might use the service. Passengers have adequate limousine service at present and there has been no need for bus service such as herein proposed. Witness does not know of any air lines at the Friendship Airport that has had difficulty in the present limousine service.

A person residing in southeast Washington makes a trip to the District Training School every two weeks by Greyhound to Laurel, thence applicant's bus to the school and the time consumed in making the trip to Laurel is about one hour and it takes about 30 minutes to get to the school. The transfer point in Laurel is a street corner or possibly a drug store during the time it is open. She is not informed as to the proposed schedules of applicant but between 11:00 a.m. and 12 noon would be convenient time for this individual. She would like to have a more convenient schedule and is presently available and through service to avoid the transfer from one line to another at Laurel. The service would be used from Washington to the District Training School and return.

There were 11 individuals that reside in Washington and travel daily to and from their place of employment which is the District Training School who appeared in support of the application. Three of the number testified, although one was withdrawn and her testimony stricken, and the other seven were present and it was stipulated that their testimony would have been, if called, similar in all respects to those there who were interrogated. Four of the witnesses have working hours from 6:30 a.m. to 3:00 p.m., two work from 10:45 p.m. to 6:45 a.m., and four work from 2:30 p.m., to 11:00 p.m. They ride the Greyhound bus to Laurel and transfer to a school bus to complete their journey to the District Training School and they return in the same manner. Six of these individuals arrive at Laurel on going to work and at hours when they are compelled to wait on the street for the school bus but there is a drug store at Laurel available for the four who work the 2:30 to 11:00 p.m., shift. If the Greyhound bus is a few minutes late in arriving at Laurel, they miss the school bus and are then compelled to take a taxi at additional expense. The distance from Laurel to the school is about four miles. Each would use the proposed service from Washington to the District Training School and return five days a week.

A postal clerk at Glen Burnie makes occasional trips by private automobile to Washington and by bus to Baltimore, thence bus or train to Washington. She would use the proposed service for shopping in Washington or visiting friends and relatives.

The Administrative Officer of the District Training School appeared in support of the application on behalf of that institution located four miles east of Laurel comprising 1,100 acres and consist of District Training School, Maple Glen School and Cedar Knolls School, three fourths mile, one mile and three miles respectively, from the entrance on Maryland Highway 602.

There are 1,100 children in the institution and 563 employees of which 200 reside in Washington. The institution operates buses daily to Laurel, transporting employees only and make 11 round-trips daily from 5:30 a.m., to 11:00 p.m., on fixed schedules as an accommodation to employees who use public transportation beyond Laurel. There is no charge to employees for this service. These schedules are planned to meet public transportation schedules at Laurel, but instances when the latter bus is late, the employee is inconvenienced by a layover in Laurel. If the employee is on the school bus he must then take a taxi from Laurel. Many applicants for positions at the school are interested in the nature of the work, but they lose interest upon advice that there is no through transportation service from Washington. Visiting hours at the school are 1:00 to 4:00 p.m., on Sundays and holidays, but visitors are not permitted to ride the school bus. Applicant operates one bus on Sunday from Laurel to the school for the benefit of visitors. Officials of the institution requested Greyhound to change one schedule to accommodate employees but it refused to make any change. A service to the entrance to the grounds on Maryland Highway 602 is not satisfactory. Witness expressed the view that there is a definite need for through bus service from Washington to the institution and return.

The Director of Education, of the District Training School resides in Washington and has eleven employees working in the office; four live in Washington, two have their own automobiles and the other two use transportation, five days a week. Most of the time the director leaves Union Station at 7:20 a.m., on the Baltimore and Ohio Railroad and arrives at Laurel at 7:45 a.m., and attempts to get a ride to work and if unsuccessful, takes a taxi. On return she has to wait an hour at Laurel for a train to Washington. Bus service to the entrance to the school on Maryland Highway 602 would not be satisfactory as she would have to walk three fourths mile to and from the

office. The director would use a proposed service five days a week.

Five individual residents of Glen Burnie some with children, would use the proposed service to Washington and return from one to four times a month. Three of these individuals have made the trip to Baltimore, thence by bus or train to Washington. Some make the trip on business and others to visit friends and relatives. They prefer a through single line service to avoid the inconvenience of interchange at Baltimore which entails a taxi fare or a walk of several blocks from one station to the other.

A representative of the Glen Burnie Civic Association, with 430 members, was authorized by resolution of that organization to support this application. The Executive Secretary of the Chamber of Commerce of Glen Burnie which has 155 members, was also authorized by resolution to appear at the hearing for the proposed service. A business man who also is a Director of the Glen Burnie Chamber of Commerce makes the trip to Washington about eight times a year on business or to attend conferences. Each witness is of the opinion that the proposed operation is necessary. A ticket agent for applicant at Glen Burnie has one to six requests daily for tickets to Washington, but he has to decline because there is no through service by applicant and he is unauthorized to sell joint line tickets. The President of Glen Burnie Improvement Association with a membership of 900 is interested in through service between Glen Burnie and Washington.

Safeway Trails, Inc., hereinafter called Safeway holds a certificate authorizing the transportation of passengers and express and newspapers in the same vehicle with passengers between Washington and Laurel and between Laurel and Fort George G. Meade, serving all intermediate points except points in the District of Columbia commercial zone. It operates 64 buses on its entire system and has three daily schedules between Washington and the

District Training School, leaving Washington at 5:30 a.m., 1:35 p.m., and 9:50 p.m., daily and 1:15 p.m., on Sunday and returning to Washington, buses leave at 7:15 a.m., 3:20 p.m., and 11:30 p.m., daily and 4:15 p.m., on Sunday. Buses leave Washington for Fort Meade at 2:15 a.m., 8:45 a.m., and 2:15 p.m., and return to Washington departure from Fort Meade is 8:15 a.m., and 10:15 a.m. One schedule was inaugurated after the first day of hearing in this proceeding and prior to the continued hearing. It operates between Washington and the National Security Agency, leaving Washington at 6:45 and 7:15 a.m., and 3:15 p.m., and on return to Washington departure time is 8:00 a.m., and two schedules at 4:40 p.m., the latter is shown over two different routes.

On April 11, 1957, Safeway proposed to applicant that a joint through one bus operation be inaugurated with applicant for the transportation of interstate passengers between Glen Burnie and Washington using the route of applicant between Glen Burnie and Fort George G. Meade and the route of protestant between the latter point and Washington. As of the day of the continued hearing, the offer had not been accepted by applicant.

W. M. A. Transit Company holds authority as a common carrier to transport passengers their baggage and express and newspapers in the same vehicle with passengers; between Washington on the one hand and on the other several points in Maryland, none of which is involved in this application. Protestant operates 89 buses in the regular route operation and charter service. About one third of its total revenue is derived from charter service which is profitable but in the overall operations it had a loss of $10,000 for the year 1956. Schedules are being eliminated or revised in an endeavor to realize a profit for 1957.

Eastern Greyhound Lines is authorized to transport passengers and their baggage and express and newspapers

between Washington and Baltimore over U. S. Highway 1 and over the express way, serving all intermediate points, and other authority not here pertinent. It operates 36 schedules over the express way and 40 over U. S. Highway 1. There is a commission agent at Laurel and the office is open from 7:00 a.m., to 11:00 p.m. Several schedules are operated by Safeway and the Pennsylvania Railroad between Washington and Baltimore. The proposed route of applicant between Baltimore and Washington is four to six miles longer than the routes of protestants. Witness believes that protestant would coordinate its schedules with applicant's operation at Laurel for service to Washington. Protestant opposes the proposed operation because of the possibility that applicant would operate between Washington and Baltimore, that the proposed service would also be in competition between Washington and Laurel; and in addition the granting of the authority sought would provide charter rights out of Washington. It has no objection to applicant operating between Laurel and Glen Burnie.

Suburban Transit Company is authorized to transport passengers and their baggage and express and newspapers in the same vehicle with passengers, between Washington on the one hand and on the other several points in Maryland including Sandy Springs, College Park and Rockville. It owns 37 buses which are used in its overall service, but approximately 15 percent of its gross revenue is derived from charter operations and without that revenue it would have been necessary to curtail some of the other service.

The Gray Lines, Inc., holds authority to transport passengers and their baggage (1) between Washington and several race tracks in Maryland, over regular routes, and (2) in special operation and one way charter operation from and to Washington, over irregular routes. Protestant operates 52 buses in conducting the above operations. About 10 percent of its revenue is obtained

from charter operations. It operated at a loss in 1956 and witness expressed opinion that another carrier in competition would cause a diversion of traffic and result in a greater loss in the future.

As seen, granting the authority sought would not be in competition with three protestants since they do not operate in the area in a regular route service. What these protestants are opposing, however, is the charter rights applicant would have if the application is granted. Right to conduct charter operations is incidental to the holding of a certificate for the transportation of passengers between fixed termini over regular routes without specific authority from the Commission for the charter service. No further consideration, therefore, need be given the evidence presented by protestants mentioned above.

Eastern Greyhound Lines operates between Washington and Baltimore over U. S. Highway 1 and another over the express way serving no intermediate points which would be served under the proposed operation except Washington and Baltimore and applicant does not propose to transport passengers between these points and is willing to accept a restriction against such service.

Safeway is authorized to transport passengers between Washington and Baltimore and between Washington and Fort George G. Meade and the latter route includes service at the National Training School and the National Security Agency. No evidence was presented by applicant with respect to the proposed service to the National Security Agency, therefore, that part of the application should be denied. The fear that protestant has with respect to applicant serving Laurel is of no consequence since applicant is not seeking authority to serve points between Washington and Laurel including Laurel. Applicant holds authority to operate between Glen Burnie and Fort George G. Meade and what it is here seeking is authority to operate between Washington and Fort George G. Meade includ-

ing intermediate points between the latter points and Laurel to render a through service between Washington and Glen Burnie. As previously mentioned, there are numerous persons in Glen Burnie and the surrounding area who would use such a service if available in preference to making the trip to Baltimore thence by bus or train to Washington. True the supporting witnesses might not use the service as often as they indicated, but on the other hand there are no doubt other residents of the area who would use through service to Washington if it was available. The same would be true of the supporting witnesses who reside in Washington. Applicant could not be expected to produce every person who would use the proposed service. Furthermore, passengers are not inclined to patronize the service where there is a change in buses en route in traveling relatively short distances as proposed by Safeway at Laurel.

The joint board is of the opinion that the evidence warrants the granting of the authority sought as described in the findings herein and that the application should be denied in all other respects.

The joint board finds that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, of passengers and their baggage; and of express and newspapers, in the same vehicle with passengers, (1) between Washington, D. C., and Fort George G. Meade, Md., from Washington over U. S. Highway 1 to Laurel, thence over Maryland Highway 602 to Fort George G. Meade and return over the same route, serving all intermediate points except those between Washington and Laurel, Md., including Laurel and (2) between junction Maryland Highways 175 and 713 and junction Maryland Highways 176 and 170 at or near Harmans, Md., from junction Maryland Highway 175 and 713 over Maryland Highway 713 to junction Maryland Highway 176.

thence over Maryland Highway 176 to junction Maryland Highway 170 at or near Harmans, and return over the same route serving all intermediate points, restricted against the transportation of passengers originating at Baltimore and destined to Washington or originating at Washington and destined to Baltimore; that applicant is fit, willing, and able properly to perform the proposed service and to conform to the requirements of the Interstate Commerce Act and the rules and regulations of the Commission thereunder; that a certificate authorizing such operation should be issued; and that the application in all other respects should be denied.

It is recommended that the appended order be entered.

By joint board No. 120.

(Signature) NORMAN B. BELT
(Signature) JOS. S. A. GIARDINA

FILE COPY

FILED
OCT 2 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 375

SAFEWAY TRAILS, INC., *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND THE BALTIMORE AND ANNAPOLIS RAILROAD COMPANY, *Appellees*.

On Appeal from the United States District Court for the District of Columbia

MOTION TO AFFIRM

FRANK B. HAND, JR.
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522 Transportation Building
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (*e*), of the Revised Rules of this Court, Appellee, The Baltimore and Annapolis Railroad Company, moves that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from the judgment of a three-judge district court (not reported) dismissing the appellants' complaint and sustaining the report and order of the Interstate Commerce Commission in *The Baltimore and Annapolis Railroad Company, Extension—Washington, D. C.*, 79 M.C.C. 123, MC 102299 Sub 7, decided March 2, 1959. The Baltimore and Annapolis Railroad Company, appellee, is engaged in performing "substituted motor-bus operations" over a network of regular routes in the State of Maryland, serving the cities of Baltimore, Annapolis, Glen Burnie, Linthicum, Harmons, Fort Meade, etc. Its predecessor company formerly operated an electric interurban railway service between these points and also between such Maryland points and Washington, D. C., the service to Washington, D. C. having been discontinued many years ago when the precedessor company became bankrupt. An application was filed with the Interstate Commerce Commission to reinstitute the service to Washington, D. C. with motor buses and, in effect, the application requested authority to operate such buses between Glen Burnie, Md. on the one hand and Washington, D. C. on the other. The proposed operation would begin at Glen Burnie, Md., proceed by the Friendship International Airport, thence via Linthicum, Md., thence via Fort Meade, with service to the District Training School located on Fort Meade property, thence to Laurel, Md. and thence over U. S. Highway 1 to Washington, D. C., and return.

Since appellee already holds operating authority between Fort Meade and the other main points, it was necessary only to apply for authority between Washington, D. C. and Fort Meade since the routes sought

would join with the established routes and permit a through service. There was widespread public support for the application, two days of hearing being held, one on March 12, 1957 and the other on May 7, 1957, before a Joint Board composed of a representative of the State of Maryland and a representative of the District of Columbia. Numerous bus lines, including the appellant, opposed the granting of the application.

The Joint Board issued a recommended report and order recommending that the application be granted with a restriction against the transportation of passengers originating at Baltimore and destined to Washington or originating at Washington and destined to Baltimore. Another restriction would prevent applicant from serving the National Security Agency, one of the larger points on the proposed route.

Protesting motor carriers filed exceptions to this recommendation and the Interstate Commerce Commission, Division 1, issued a report adopting the recommendation of the Joint Board and the decision of Division 1 was approved by a decision of the entire Commission dated March 2, 1959, the membership of the Commission dividing 6 to 5 for approval.

Thereafter a temporary restraining order was obtained by appellant from the lower court. However, after brief and argument the complaint was dismissed, the court holding the decision of the Interstate Commerce Commission lawful in that the necessary findings of fact had been made and holding that the Interstate Commerce Commission had not exceeded its discretion in adopting the recommendation of the Joint Board.

The argument of the appellant made in the lower court is almost identical to that before this Court and will be answered in the next section of this motion.

ARGUMENT

Appellant presents three questions, the first being whether the lower court was correct in sustaining the failure of the Interstate Commerce Commission to give consideration to the so-called "through-route proposal" of Safeway Trails and whether the lower court was justified in sustaining the Commission for failing to consider the detrimental effect upon existing motor bus carriers operating in Washington, D. C. by reason of the acquisition by appellee of special and charter rights under Section 208 (*e*) of the Interstate Commerce Act, [49 U.S.C. § 308 (*e*)]. Appellant questions whether the District Court was correct in sustaining the basic findings of the Commission as to the inadequacy of existing service between Washington, D. C. on the one hand and the District Training School at Fort Meade on the other, the contention being that neither the Commission nor the Court correctly construed and applied the substantial evidence rule as approved in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, (1951).

1. At the continued hearing appellant proposed that appellee join in a through-bus operation with appellant between Glen Burnie, Md., and Washington, D. C., using equipment of the appellee between Glen Burnie and Fort Meade and that of the appellant between Fort Meade and Washington. The President of the appellee company testified that this proposal was not agreeable to his company and not feasible nor practicable.

It is contended that Section 216 (a) of the Interstate Commerce Act, [49 U.S.C. § 316 (a)] places a duty on all common carriers of passengers to establish through routes. While this may be true, appellant ignores the wording of the statute to the effect that the duty applies to "reasonable through routes." The duty is to establish only "reasonable" through routes and, in order to determine whether a through route is reasonable under the statute, provision is made under Section 216 (e) of the Interstate Commerce Act [49 U.S.C. § 316 (e)] for carriers to come before the Commission by complaint, petition or otherwise, and ask that another carrier be required to enter into a through route. In fact, the public may file such petition or complaint. Appellant filed no such complaint or petition under Section 216 (e) of the Act and thus the only issues involved are those under Section 207(a) [49 U.S.C. § 307 (a)] involving the question of whether public convenience and necessity require the proposed operation. Thus the proposal for the through-route is used as a defensive measure by appellant in an effort to defeat the application. We know of no statutory duty upon a motor carrier to establish a through route simply upon the request of another motor carrier and appellant cites no such statute.

The provisions of Section 216 (a) are not mandatory. In *Wolzinger* v. *Burlington Transp. Co.*, 43 M.C.C. 51, 53, the Commission stated:

> "The duty of motor carriers of passengers under section 216 (a) of the Interstate Commerce Act is to establish reasonable through routes and joint fares. Whether a through route sought to be established is reasonable must be determined from the circumstances in each case. Our duty under section 216 (e) of the act is to require the

establishment of through passenger routes and joint fares when they are necessary or desirable in the public interest.

* * * "The defendants have no duty under section 216 (a) to establish through routes merely to enable the complainant to share in transportation which they can perform. See *Crown Coach Co.* v. *Mo-Ark Coach Lines, Inc.*, 27 M.C.C. 746, sustained in 44 Fed. Supp. 547."

Section 1 (4) [49 U.S.C. § 1] applying to the application of rail carriers has similar provisions to those under Section 216 (c) of the Act. Prior to the 1940 amendment to the Interstate Commerce Act this provision did not contain the term "reasonable through routes" and, in connection therewith, the Commission made the following statement in *Routing Restrictions over Seatrain Lines, Inc.*, 296 I.C.C. 767, 774:

"The law imposes certain obligations upon a carrier which joins with its connecting carrier in establishing a through route. It is not unreasonable for such a carrier to refuse to assume those obligations over all routes, and it cannot be required under the law to assume those obligations over a particular route merely because a shipper or connecting carrier selects it. In this connection it is noteworthy that for many years the duty imposed by section 1 (4) upon common carriers by railroad included the 'duty to establish through routes,' and it was not until 1940 that Congress deliberately modified that paragraph so as to restrict the provision to "reasonable through routes.'"

The lower court held that section 216 (a) imposes no such duty as claimed by appellant and quoted *Crown*

Coach Co. v. United States, 44 F. Supp. 547, 550 (W.D. Mo. 1942) and stated that it is subject at least to a determination of what is reasonable under the circumstances. The court went on to hold that the appropriate and usual procedure was to bring a complaint under Section 216 (*e*) of the Act and the court recognizes that appellant's request was "raised as a defense in the Section 207 (a) proceeding in order to defeat the grant of the certificate to the Railroad." The court held that it was well within the Commission's discretion to decline "to consider Safeway's request in detail, and in granting the operating authority to the Railroad to establish its own service."

2. Appellant has continued to contend throughout the Commission and court proceedings that the Interstate Commerce Commission must take into consideration the effect of the incidental grant of charter rights to applicant when granting a Certificate of Public Convenience and Necessity to transport passengers from Washington, D. C. These special and charter rights are granted to every holder of a certificate permitting transportation of passengers in interstate commerce by Section 208 (*c*) of the Act [49 U.S.C. § 308 (*c*)]. For the Commission to require an applicant to establish a need for additional charter rights when applying for a regular route operating service and to then go into the question of whether there is a public need for the charter service, would be a vain and futile act in view of the fact that the Commission has no alternative under the statute but to permit the special and charter rights if and when a Certificate of Public Convenience and Necessity is granted. The application in question was filed under Section 207 (a) [49 U.S.C. § 307 (a)] which provides, among other things:

> "Subject to section 210, a certificate shall be issued to any qualified applicant therefore, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; . . ."

Thus if public convenience and necessity are found to require the proposed operation of the applicant over the regular route, then it is mandatory that the certificate be issued and the incidental and special charter operating rights ensue. Even though the Commission has suggested to the Congress that Section 208 (*c*) of the Act be eliminated and the Senate has gone so far as to pass such legislation in 1955 (Senate Bill 1459), until the law is changed the Commission has no alternative but to act as it did in accordance with the statute. The lower court found:

> "Although it is true that Section 208 (a) of the Act, added by 49 Stat. 552, 49 U.S.C. Sec. 308 (a) (1952), allows the Commission to attach 'to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require,' the fact remains that, as early as 1937, Section 208 (*c*) was interpreted to be a mandatory provision granting the Commission no authority to place any limitation in a certificate which would restrict charter privileges. *Peninsula Transit Corporation Common Carrier Application*, 1 M.C.C. 440, 442 (1937). In the 1941 *Regulations Governing Special or Chartered*

> *Party Service*, 29 M.C.C. 25, 46, the Commission reaffirmed that 'Section 208 (c) . . . confers an additional right, *without proof, and which is not severable*, to carriers operating over a regular route or routes and between fixed termini. . . .' (Emphasis added.)."

The court goes on to find that the Commission's interpretation of the statute is a reasonable one within the scope of the power and discretion conferred by the governing statute, citing *Gray* v. *Powell*, 314 U.S. 402 (1941).

3. Appellant contends that the lower court failed to correctly apply the "substantial evidence rule." The lower court found that:

> "The needs for service to the mentioned points were all the subject of testimony and were carefully considered by the Commission. * * * As to the other points served, we think that the Commission's basic finding that the existing service "between Washington and Glen Burnie, including that to the District Training School, is patently inadequate," when read with the reports of Joint Board No. 120 and Division 1 of the Commission, see 76 M.C.C. 727 (1958), is sufficient to comply with the requirements of law, and is based on ample evidence."

Appellant argues, however, that there is evidence in the record which, if considered by the Commission, should result in a different decision. Appellant refers to the service presently performed by Safeway between points involved in the application although this service was not begun until after the first day of hearing in the proceeding. Appellant contends that for this reason the decision of the Commission should be

reversed. In contrast to appellant's contention, to establish a public need appellee introduced witnesses representing the Glen Burnie Improvement Association (900 members), the Glen Burnie Park and Civic Association (430 members), the Glen Burnie Chamber of Commerce, the Director of Aviation of the City of Baltimore in charge of Friendship International Airport, the Association of Scheduled Passenger Air Lines of Baltimore, the Westinghouse Corporation, the Childrens' Center including the District Training School, Maple Glen and Cedar Knolls School located on Camp Meade property, and the numerous members of the public desiring through bus transportation between Glen Burnie and the surrounding area on the one hand and Washington, D. C. on the other.

These witnesses established that there was no direct bus service whatever between Glen Burnie, Friendship International Airport, Linthicum, and the District Training School on the one hand, and Washington, D. C. on the other.

Evidence was submitted showing that employees of the District Training School had to go to Laurel and there change buses, that there were no waiting facilities at Laurel, and that visitors to the District Training School had no direct bus service. Numerous witnesses testified that the existing service was inadequate. At the time of the second hearing, approximately two months later, Safeway had begun bus service to District Training School and had added new schedules to Fort Meade although there was still no service to Glen Burnie, the Airport or the surrounding territory. The evidence submitted by Safeway indicated that there were few passengers to the Training School and that the operation was unprofitable. It was brought out

that Safeway had proposed the through service with appellee.

The evidence submitted by Safeway were all self-serving declarations of its own employees and included no evidence from the public to establish that its new service was satisfactory or would meet the public need brought out at the first hearing.

The Commission considered this evidence and described it in its report. Within its jurisdiction the Commission found that the proposed service "would fulfill a demonstrated need for such a service."

Appellant contends that no specific finding was made in connection with service to or from Fort Meade but the Commission's report contains the finding:

> "The existing service between Washington and Glen Burnie, including that to the District Training School, is patently inadequate."

The District Training School is on the Fort George Meade grounds and thus appellant would apparently have the Commission make a finding of fact to a need for service between each and every stop on the regular route from Glen Burnie down to Laurel."

Safeway argues that if a need had been shown for service between Fort Meade and Washington then Safeway would have increased its service to fulfill that need and contends that the grant of that authority from Fort Meade is merely an adjunct to appellee's proposed service from Glen Burnie. The District Training School occupies over 1,000 acres of the Fort Meade property and it is clear that the Commission considerd all of these factors in making its decision since the two reports of the Commission cite all of

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this evidence. The action of the lower court in sustaining the Commission on this point is in line with the decision of this court *in U. S. v. Pierce Auto Freight Lines*, 327 U.S. 515, 531, where this court held that the finding that public convenience and necessity required the proposed service was sufficient. There the District Court had remanded the proceeding since it failed to disclose that it had given any consideration to the possibility of adverse effect upon any plaintiff of the institution of two through line competitive operations. In reversing the lower court the Supreme Court stated (66 S. Ct. 696):

> "And the findings expressly stated, concerning each application, that the "present and future public convenience and necessity require the extended operations.
>
> "Apart from the fact that this was all that the statute required, cf. *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 66 S. Ct. 74 [90 L. Ed. 38], and the further fact that there can be no presumption that the Commission disregarded the public or any other interest, there are two obvious answers. One is that the Commission, in making the separately stated findings, could not have been oblivious to the competitive consequences of its order or the relation of those consequences to the public interest. The other is that those findings, read in the light of the report, adequately and expressly cover the element of public convenience and necessity, including the competitive factors which the Commission inescapably had in mind."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Appeal presents no substantial question

and that the judgment of the District Court should accordingly be affirmed.

Respectfully submitted,

FRANK B. HAND, JR.
Attorney for The Baltimore and Annapolis Railroad Company, Appellee.

October 1959

Certificate of Service

I, Frank B. Hand, Jr., Attorney for The Baltimore and Annapolis Railroad Company, appellee, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the second day of October, 1959, I served copies of the foregoing Motion to Affirm on the several parties to this appeal, as follows:

1. On the Appellant, by mailing copies by prepaid first class postage to William A. Roberts, Esq., and Maxwell A. Hogwell, 600 Continental Building, Washing 5, D. C.

2. On the United States of America, Appellee, by mailing copies by prepaid first-class postage to James H. Durkin, Esquire, Attorney, Department of Justice, Washington 25, D. C.

3. On the Interstate Commerce Commission, Appellee, by mailing copies by prepaid first-class postage to Arthur J. Cerra, Esquire, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

FRANK B. HAND, JR.

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No. 375

In the Supreme Court of the United States

OCTOBER TERM, 1959

SAFEWAY TRAILS, INC., APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND THE BALTIMORE AND ANNAPOLIS RAILROAD CO.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the judgment of a special statutory three-judge district court sustaining an order of the Interstate Commerce Commission awarding appellee The Baltimore and Annapolis Railroad Co. ("Railroad") a certificate of public convenience and necessity to extend its motor-carrier bus operations.

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Prior to the instant proceeding, the Railroad had authority to operate buses as a common carrier between Baltimore and Annapolis, Maryland, over a series of routes including those serving Glen Burnie, Md., and Fort Meade.[1] On January 10, 1957, it applied for a certificate covering three additional routes, thereby extending its existing routes between Glen Burnie and Fort Meade to Washington, D.C., and enabling it to provide through service between these two (as well as certain intermediate) points and Washington (J.S. 23a–25a). After hearing, a Maryland and District of Columbia Joint Board recommended (J.S. 23a–34a) that the certificate be granted for two of the routes, finding that there was no need for additional service on the third (J.S. 32a). On exceptions, Division 1 of the Commission adopted the joint board's recommendations (J.S. 7a–13a).

On reconsideration, the full Commission affirmed (J.S. 14a–22a). It held (J.S. 19a) that the existing service between Washington and Glen Burnie was "patently inadequate," since "passengers on public vehicles are subjected to inconvenient, time-consuming, and sometimes expensive interchanges, and prospective passengers are discouraged from using the existing public transportation services"; that "a rather widespread desire for the proposed service exists"; and that "the proposed service * * * would fulfill a demonstrated need for such service."

[1] The Railroad conducts some freight, but no passenger, operations by rail (J.S. 16a–17a, 20a).

The three-judge district court unanimously upheld the order. In a comprehensive opinion by Circuit Judge Washington (J.S. 1a–6a), the court fully considered and rejected appellant's challenges to the order. The court, on the basis of its own review of "the administrative record, including the recommended report of the Joint Board, the report of Division 1 of the Commission, and the report of the Commission, as well as the testimony taken in the proceedings" (J.S. 6a), concluded that the Commission "did not exceed its authority, and had a rational basis for its action" (*ibid.*).

ARGUMENT

1. Appellant contends (J.S. 9–12) that the Commission, in granting the certificate for the new operating authority, improperly refused to consider its offer to enter into a through route with the Railroad—a route over which, allegedly, the same service could be provided. It argues, on the basis of the Commission's factual statement that this proposal was not acceptable to the Railroad, that the Commission erroneously held that it has no power, in a certification proceeding under Section 207(a) of the Interstate Commerce Act (49 U.S.C. 307(a)), to consider a proposal to establish through routes as a ground for rejecting the proposed service.

This argument misconceives the basis of the Commission's rejection of appellant's proposal. The Commission did not rule that it has no power to consider a through-route proposal in a certification proceeding, but merely declined to deny an application for needed service because of the through-route offer. In fact, in

at least two other cases it has denied certificate applications for precisely that reason (*Tri-State Transit Co., of La., Inc., Extension—Holly Springs,* 11 M.C.C. 285, 292; *Missouri Pac. Transp. Co. Extension—Natchez-New Orleans,* 9 M.C.C. 712, 714–715). Four of the dissenting Commissioners here similarly would have denied the application on that ground (J.S. 21a–22a).

While Section 216(a) of the Act (49 U.S.C. 316(a)) imposes a "duty" on motor carriers "to establish reasonable through routes with other such common carriers," Section 216(e) (49 U.S.C. 316(e)) establishes a specific procedure which a carrier seeking to compel the establishment of through routes must follow. It must file a complaint with the Commission, and in the ensuing proceedings it has the burden of proof that the through route sought is "necessary or desirable in the public interest." Appellant, however, filed no complaint under Section 216(e), but instead attempted to inject the through-route issue into the certification proceedings as a ground for defeating the application. If the Commission had permitted appellant thus to raise the issue, the burden of proof would have been put on the Railroad to show why it should not be required to enter into such an arrangement. In the circumstances, we submit that the district court correctly held that the Commission "was well within its authority and discretion in declining to consider Safeway's request in detail, and in granting the operating authority to the Railroad to establish its own service" (J.S. 4a–5a). Thus, to the extent that appellant may be arguing that, as a matter of law, the Commission

was required to make detailed findings on appellant's through-route offer, the answer is, as the court below pointed out (J.S. 4a–5a), that the Interstate Commerce Act imposes no such limitations or obligations.

2. Appellant challenges the Commission's failure to consider, in determining whether public convenience and necessity required the certification of the Railroad, the alleged adverse competitive effect of such certification upon appellant's existing charter and special services operating out of the City of Washington.[2] Under Section 208(c) of the Act (49 U.S.C. 308(c)), a motor common carrier's certificate authority to transport passengers to and from specified points also authorizes it to transport "special or chartered parties." Appellant states (J.S. 12), that the Railroad plans to "compete actively for the existing special and charter business"; and it argues (J.S. 13) that the Commission could have "restrict[ed] the Railroad from competing for special and charter business within Washington, D.C." pursuant to its authority, under Section 208(a) of the Act (49 U.S.C. 308(a)), to impose upon certificates "such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require * * *."

From the outset of motor carrier regulation, however, the Commission has uniformly held that its gen-

[2] A carrier conducts "charter service" when it hires its bus to a person for a given operation selected by the hirer. When the carrier itself sells tickets to individual passengers desiring a journey designated by the carrier (as in sightseeing buses) this is a "special operation". See *Fordham Bus Corp.* v. *United States*, 41 F. Supp. 712, 717 (S.D.N.Y.).

eral authority under Section 208(a) to impose "terms, conditions and limitations" upon certificates does not permit it to restrict a carrier's statutory right to conduct special or charter operations to and from points which it is certificated to serve. See *Peninsula Transit Corp. Common Carrier Application*, 1 M.C.C. 440, 442; *Regulations Governing Special or Chartered Party Service*, 29 M.C.C. 25, 46; *The Baltimore and A.R.Co. Extension—Fort George G. Meade*, 63 M.C.C. 357, 366. While the Commission has, since 1955, annually requested Congress to change the Act so that special and charter rights would not automatically flow from a route award (see, *e.g.*, 72nd Annual Report of the Interstate Commerce Commission, p. 136 (1958)), Congress has not done so. Moreover, in favorably reporting a bill (S. 1459, 85th Cong., 1st Sess.) to require applicants "to show a need for the service of transporting special or charter parties," the Senate Committee on Interstate and Foreign Commerce expressly recognized that "the right to transport special or chartered parties is actually an incident to the right granted * * * to engage in the transportation of passengers by motor vehicle over regular routes between fixed termini." (S. Rep. No. 465, 85th Cong., 1st Sess. (1957), p. 2.)

In the circumstances, the court below correctly held (J.S. 6a) that the Commission's settled interpretation of Section 208(c) as a "mandatory provision granting the Commission no authority to place any limitation in a certificate which would restrict charter privileges * * * is a reasonable one within the scope of the power and discretion conferred by the gov-

erning statute;" and properly declined "now [to] consider whether some other construction of Section 208(a) would be permissible."[3]

3. Finally, appellant challenges (J.S. 14–17) the holding below (J.S. 2a) that "ample evidence" supports the Commission's finding that the existing service is inadequate. The court below reached this conclusion after reviewing the entire "administrative record" (J.S. 6a), the conclusion is correct, and there is no occasion for a second re-examination of the record by this Court. See *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.[4]

[3] Appellant's contention (J.S. 13) that, even if the Commission had no authority to limit the Railroad's special and charter operations, it nevertheless should have considered the effect of such operations as an element of public convenience and necessity in passing on the certificate application, is but another formulation of its main argument. Since a carrier's special and charter rights are merely incidental to, and flow directly from, its certificate authority, a new route service required by the public convenience and necessity cannot be rejected merely because of the effect of the incidental special and charter authority thereby conferred upon such incidental authority of other carriers.

[4] Appellant also contends (J.S. 16) that since the Commission found inadequacy of service only "between Washington and Glen Burnie" and not between Washington and Fort Meade, it was not warranted in authorizing service to the latter point—a contention not made either before the Commission or the district court. The short answer, as the district court pointed out (J.S. 2a), is that the finding of inadequacy between Washington and Glen Burnie, when read in conjunction with the reports of the Joint Board and Division 1 (which discussed the inadequacy of service to Fort Meade, J.S. 8a, 9a, 10a–11a, 12a–13a, 29a–30a, 32a–33a), was sufficient to authorize service to Fort Meade.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court is correct and should be affirmed.

Respectfully submitted.

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On Appeal From the United States District Court for the District of Columbia

BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

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BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

FOREWORD

Appellant (Safeway Trails) presents this brief in opposition to the motion of The Baltimore and Annapolis Railroad Company (Railroad), received October 3, 1959, and to the similar motion of the United

States of America and of the Interstate Commerce Commission (herein collectively called the Commission), received October 9, 1959, which seek to affirm the judgment of the specially constituted three-judge United States District Court for the District of Columbia, entered June 30, 1959 from which this direct appeal is taken.

The Statement as to Jurisdiction filed herein sets forth the basis of this Court's jurisdiction to entertain this direct appeal, the statement of the case and a statement of the questions presented and their substantiality. In addition, it contains the opinion of the District Court,[1] the opinion of division 1 of the Commission, the opinion of the Commission upon reconsideration and the recommended report of Joint Board No. 120, as Appendices A, B, C and D thereto respectively.

Safeway Trails asserts that the questions presented by this appeal are substantial and merit consideration by this Court upon full brief and argument after which the judgment of the District Court should be reversed and the injunction heretofore issued made permanent.

SUMMARY OF ARGUMENT

1. The Commisison possesses ample jurisdiction to compel the institution of a through route by a recalcitrant passenger motor carrier as a condition to the grant to that carrier of a certificate of public convenience and necessity. The failure of the Commission so to condition the certificate granted to the Railroad in

[1] The opinion of the District Court also may be found in the advance sheets at 176 F. Supp. 201 (1959); *Safeway Trails, Inc.* v. *Interstate Commerce Commission, et al.*

the instant case was based upon the erroneous belief of the Commission that it lacked jurisdiction to impose such a condition notwithstanding its contrary belief as to rail carriers under almost an identical statute. The motions to affirm filed herein fail to meet this contention, the resolution of which is of substantial importance to appellant, to the interstate passenger motor carrier industry generally and to the traveling public.

2. Although the Commission consistently has held itself to be without jurisdiction to limit the termination points of special and charter transportation performed by duly certificated regular route motor carriers, it has, nevertheless, recognized its authority to limit the point of origin of such charter and special transportation. Its disclaimer of jurisdiction to limit the Railroad from originating charter or special transportation at Washington, D. C. was contrary to law and to the facts and circumstances of this case.

The Commission, likewise, erred as a matter of law in failing to consider and by rejecting the unrefuted evidence of record as to the crippling and destructive effect upon the operations and services of existing Washington, D. C. carriers brought about by the Railroad's unwaranted intrusion into the charter and special transportation field originating within Washington, D. C.

The numerous petitions of the Commission and others to the Congress in this regard evidence the importance and substantiality of these issues which fully are resolvable by this Court.

3. Despite the several misleading and incorrect statements contained in the motions to affirm, the fact remains that the Commission failed to make an essential

finding of fact as to the need for service to Fort Meade; if such a finding had been made it would have been without the support of substantial evidence of record. The jurisdictional finding of the inadequacy of existing service to the District Training School was made by the Commission on Petition for Reconsideration without taking into consideration the contradicting evidence offered by appellant Safeway Trails. In resolving these contentions the District Court failed to apply the substantial evidence rule laid down by this Court in *Universal Camera Corp.* v. *National Labor Relations Bd.*, 340 U.S. 474 (1951) and misapplied the requirements of Section 8(b) of the Administrative Procedure Act, 60 Stat. 242 (1946), 5 U.S.C. § 1007(b).

ARGUMENT

1. THE QUESTION ON THROUGH-ROUTES

The Commission by its motion to affirm again seeks to obfuscate the issues raised by Safeway Trails, a tactic which paid dividends in the court below. Safeway Trails consistently has argued that the Interstate Commerce Act delegated to the Commission ample jurisdiction over the interstate passenger motor carrier industry to compel the institution of a through route by a recalcitrant carrier as an alternative or condition to the granting of the application of that carrier of a certificate of convenience and necessity under Section 207(a) of the Act.[2] Counsel for the Commission, on the other hand, consistently argued to the District Court below that the Commission was without such authority. Unfortunately, the opinion of the District Court fails utterly to solve this dispute; that court

[2] Section 207(a), Part II of the Interstate Commerce Act, 49 Stat. 551 (1935); 49 U.S.C. § 307(a).

apparently being content to digress on procedural grounds by pointing to Section 216(c) of the Act as being the "... appropriate and usual procedure to bring about the establishment of such a through route ..." (J.S. 4a) and the filing of a complaint thereunder.[3]

Such a disposition, however, ignores the substance of this very real problem which with greater frequency is commanding the attention of the industry, if not the Commission. Within the concept of *public convenience and necessity* is found authority sufficient to permit

[3] The immediate answer to this contention is that the requirements of a written complaint were satisfied by inclusion in the written record before the Joint Board of the oral "complaints" made by counsel and witnesses for Safeway Trails in addition to a letter received into evidence as Exhibit No. 19. See for example, *Forrestal* v. *Abilene & S. R. Co.*, 263 I.C.C. 457, 460 (1945), wherein the Commission, interpreting its own rules on this subject, held:

> "The first three of these rules might seem to imply that all amendments must be documentary in the usual sense. However, a stenographer's written minutes of a hearing, recording any oral amendments, meet the practical necessities of the situation. *The defendants are looking to form rather than substance: The oral amendment fully advised them of the issues they had to meet.* The most for which they could reasonably have asked was time to prepare and present evidence respecting the particular shipments included by the amendments. They made no request in that respect." (Italics supplied)

The Railroad did not ask for additional time to answer the through route demand of Safeway Trails. Indeed, none probably was warranted inasmuch as the Railroad already had received more than 3 weeks prior written notice by letter of the demand of Safeway Trails. See § 1.35(c) of the *General Rules of Practice before the Commission*, effective October 1, 1956, which provides for 20 days within which to answer a complaint.

the *affirmative* consideration by the Commission[4] of a through route demand when raised in a proceeding initially instituted under Section 207(a) of the Act; certainly, not only has this Court, but the Commission as well, consistently applied to this standard its intended liberal construction.[5]

While the District Court very well may be correct in stating (J.S. 4a) that "(t)he Commission has never required the institution of through routes" in a Section 207(a) proceeding or in the absence of a formal complaint filed under Section 216(c) of the Act, nevertheless, it is equally correct that the Commission never has required the establishment of a through route in a

---

[4] The arguments advanced in the motions to affirm avoid the issue and address themselves only to negative consideration by the Commission.

[5] In one of its earliest decisions under Section 207(a) of the Act, the I.C.C. is found giving the following construction:

> "Perhaps the best interpretation of the purpose underlying the *public convenience and necessity* provisions was by the Supreme Court in *Texas & N. O. R. Co.* v. *Northside Belt Ry. Co.*, 276 U.S. 475, 479, as follows:
>
> > "The purpose of paragraphs 18 to 22 is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest.'
> >
> > "The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest." *Pan-American Bus Lines Operation*, 1 M.C.C. 190, 203 (1936).

complaint proceeding instituted under Section 216(c).[6]

However, in a convenience and necessity proceeding instituted under § 1(18) of Part I of the Act,[7] by a railroad seeking to extend its line, the Commission, when confronted with a through route demand by a competing railroad, found itself with ample jurisdiction over the subject, notwithstanding the failure of the competing railroad to follow the complaint procedure established by § 15(3) of the Act.[8] And the relevant language of § 15(3) is identical to that of the complaint procedure of § 216(c):[10] There, in a convenience and

[6] The Commission consistently has found itself without jurisdiction to compel motor carriers of property to institute through routes because of the permissive character of the language of § 216(c) of the Act: "Common carriers of *property* by motor vehicle *may* establish reasonable through route . . ." (italics supplied) 49 Stat. 558 (1935), 49 USC § 316(c). *Royons Between Trunk Line and New England Territories*, 44 M.C.C. 280 (1944); *Restrictions, Riss & Co., and Eliminations, Hi-Way Motor*, 46 M.C.C. 290 (1946). As to motor carriers of passengers, however, the language of § 216(a) is mandatory: "*It shall be the duty* of every common carrier of *passengers* by motor vehicle to establish reasonable through routes with other such common carriers . . ." (italics supplied) 49 Stat. 558 (1935), 49 USC § 316(a).

[7] 41 Stat. 476 (1920), 49 USC § 1(18).

[8] *Northern Pac. Ry. Co. Operation*, 261 I.C.C. 631, 642 (1946): "It is conceded by the Navy Department that the question whether a certificate should be issued upon condition that joint rates and through routes with other carriers be established *is one within the jurisdiction of this Commission* . . ." (italics supplied)

[9] 54 Stat. 911 (1940), 49 U.S.C. § 15(3).

[10] Cf. *§ 15(3)* "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint establish through routes . . ."

§ 216(c) ". . . the Commission shall whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes . . ."

necessity proceeding under § 1(18) of the Act, the Commission found its through route authority by virtue of its power to attach conditions to a certificate of public convenience and necessity as permitted by § 1(20) of the Act.[11] The Commission possesses the same power to condition a § 207(a) certificate by virtue of § 208(a) of the Act.[12]

Counsel for the Commission on page 4 of its motion to affirm, thus, are incorrect in stating that § 216(c) affords the only avenue available for the creation by the Commission of a through route between carriers. And contrary to the assertion of counsel for the Commission (page 5), Safeway Trails does not necessarily argue in favor of *detailed findings* by the Commission on the through route request; rather does Safeway Trails argue that a finding must be made at least in the language of § 216(a) as to the *reasonableness* of the through route demand. Even the District Court concluded this point when it stated:

> "But such a duty [to establish a through route under § 216(a)] is not absolute, see *Crown Coach Co. v. United States*, 44 F. Supp. 547, 550 (W.D. Mo. 1942), and is subject at least to a determination of what is reasonable under the circumstances.

[11] § 1(20) "The Commission . . . may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require . . ." 41 Stat. 478 (1920), 49 U.S.C. § 1(20).

[12] § 208(a) ". . . and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, *including terms, conditions and limitations as to the extension of the route or routes of the carrier* . . ." (italics supplied) 49 Stat. 552 (1935), 49 U.S.C. § 308(a).

see *Wolzinger* v. *Burlington Transportation Co.*, 43 M.C.C. 51, 53 (1943)." (J.S. 4a)

No such finding as to *reasonableness* was made by the Commission in the instant case; and it cannot be argued fairly that the Commission, in light of its own written opinion, did anything other than acknowledge the existence of the through route demand of Safeway Trails; certainly it failed to consider the reasonableness of the through route.

The Railroad in its motion to affirm (page 7), likewise, concedes that at least a determination of what is reasonable under the circumstances was appropriate in the instant case.[13] Had the Commission recognized its obligation under the Act and considered the facts and circumstances of the through route demand,[14] it would have concluded upon the *reasonableness* of the proposed through route and, thereafter, granted *only in part*[15] the application of the Railroad for a certificate of public convenience and necessity upon the express

[13] On page 5 of its Motion the Railroad also argues that "(t)he provisions of Section 213(a) are not mandatory." It is difficult to conceive more commanding language than: "*It shall be the duty . . .*"

[14] The unrefuted testimony before the Commission was that the through route demand, from an operational point of view, was at least equal to the service proposed by the Railroad for its exclusive operation which would have deposited passengers on city streets instead of at the centrally located Trailways Terminal utilized by Safeway Trails. Need for shelter was expressed by all of the public witnesses offered by the Railroad.

[15] The Railroad sought three routings from the Commission, one of which was for authority between Fort Meade and Washington, another of which was denied (J.S. 9a), and a third of which was for an improved route from Glen Burnie to Fort Meade which was unopposed. The Commission granted the first and third of these requests. (J.S. 8a).

condition that the Railroad enter into a through route as demanded and proposed by Safeway Trails.[16]

The motions to affirm filed herein do not question the substantiality of the issues presented by the appeal; rather do these motions address themselves to the correctness of some of the solutions advanced by Safeways Trails to these issues. The importance to the commerce of our nation of the establishment of through routes between carriers was recognized fifty years ago in a situation, although dissimilar to that now presented, this Court, in reflecting upon the establishment of through routes, observed:

> "Nothing has perhaps contributed more to the wealth and prosperity of the country than the almost universal practice of transportation companies to co-operate in making through routes and joint rates. Through this method, a situation has been brought about by which, though independently managed, connecting carriers become in effect one system. This practice has its origin in

[16] On page 4 of its motion to affirm, the Railroad states that the through route demand of Safeway Trails contemplated ". . . using equipment of the appellee between Glen Burnie and Fort Meade and that of the appellant between Fort Meade and Washington." This is untrue. What Safeway Trails did propose was a through operation without change of bus en route; that either all Railroad equipment, or Safeway equipment or a combination of equipment could be utilized depending upon the preference of the Railroad. The fact is, that as far as the public were concerned, the operation as proposed by Safeway would have been at least as satisfactory as that proposed by the Railroad; probably it would have been better because of the superior equipment, manpower and terminal facilities of Safeway Trails; most assuredly it would have been vastly superior financially to both carriers, than the economically unsound operation proposed by the Railroad. The Commission, however, ignored these factors upon the belief that it lacked the power to compel the institution of a through route except in a § 216(e) complaint proceeding.

the mutual interest of such companies and in the necessities of an expanding commerce." *Atlantic C. L. R. Co.* v. *Riverside Mills*, 219 U.S. 186, 198 (1910)[17]

Safeway Trails is a member of the National Trailways Bus System, an unincorporated association of independent bus companies offering to the public nationwide bus service by virtue of the through routing of buses. This Court may be assured that many of these through routes were not created altogether willingly but arose through the recognition by these companies[18] of the mandatory provisions of § 216(a), the very provisions which the opinion of the District Court dilutes and which appellees would destroy. Failure of this Court to note probable jurisdiction herein probably will not result in the collapse of the Trailways association, but it certainly will diminish the negotiating power of many of its member companies. And the very evils which Part II of the Act sought to destroy will be revived to the public detriment.

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[17] The existence of through routes among carriers is not bottomed upon a common law right of one carrier to compel another to join in the creation of a through route for at common law only through voluntary cooperation could a through route come into existence. *Atchison, T. & S. F. R. R. Co.* v. *Denver & N. O. R. R. Co.*, 110 U.S. 667 (1883). §§ 1(4), 216(a) and 305(b) of the Act made mandatory the creation of reasonable through routes by railroads, motor carriers of passengers and water carriers, respectively.

[18] Many of these companies actively compete among themselves as well as with other independents and the giant Greyhound Corporation. Inroads into the motor carrier industry by the railroads with their crushing financial resources, including Commission supported financing, are a matter of great concern to these independents.

2. THE QUESTION ON SPECIAL AND CHARTER BUS SERVICE

Counsel for the Commission, on pages 5 and 6 of its motion to affirm, argue that the Commission is without authority to condition or limit the transportation of special or charter parties authorized by § 208(c) of the Act[19] to regular route carriers duly certificated under § 207(a) of the Act.[20] In support of this position the Commission cites *Peninsula Transit Corp. Common Carrier Application*, 1 M.C.C. 440; *Regulations Governing Special or Charter Party Service*, 29 M.C.C. 25; and *The Baltimore and A. R. Co., Extension-Fort George G. Meade*, 63 M.C.C. 357.[21]

Citing the first of these three cases, the District Court rejected the arguments of Safeway Trails and concluded that despite the authority granted by § 208(a) to condition or limit a certificate of public convenience and necessity, "... the fact remains that as early as 1937, Section 208(c) was interpreted to be a mandatory provision granting the Commission no authority to place any limitation in a certificate which would restrict charter privileges." (J.S. 5a, 6a). It is incredible that the District Court could have read and under-

[19] 49 Stat. 552 (1935), 49 U.S.C. § 308(c).

[20] This same argument is advanced by the Railroad on pages 7, 8 and 9 of its motion to affirm.

[21] It is curious to note that in *Baltimore and A. R. Co., Extension—Fort George G. Meade*, 63 M.C.C. 357 (1954) this same Railroad was found arguing of the existence of a great demand for direct service between Baltimore and Fort Meade and of its strong desire to provide through route service with other carriers (359). Despite the opposition of Safeway Trails and numerous other carriers, the Commission granted the Railroad the sought after certificate. To date, the Railroad has yet to operate a single direct bus between Baltimore and Fort Meade, and it has steadfastly refused to operate in through route service with any other carrier.

stood the holding of the Commission, in the Peninsula case, *supra*, for there the holding of the Commission rather than supporting the District Court and the argument of appellees, on the contrary, is strong authority in support of the contention of Safeway Trails.

The Peninsula case, *supra*, held:

> "We have no authority to place any limitation upon the destination points or territory which a regular route common carrier of passengers may serve in special or chartered party operations. *We may, however, by special or general rules and regulations, impose appropriate limitations as to origin territory, and prescribe terms and conditions applicable to such operations which are consistent with the provisions and policy of the Motor Carrier Act.*" *Peninsula Transit Corp. Common Carrier Application*, supra, 1 M.C.C. at p. 442[22] (italics supplied)

This interpretation is entirely consistent with the language of the Act itself which provides for service "*to* any point within the United States" but which makes no mention as to the points of origin.

Safeway Trails and the numerous other protesting carriers before the Commission[23] never argued that the

[22] The Commission there went on to impose a restriction on the certificate issued to the carrier limiting the points at which Peninsula may originate special or charter parties under § 208(c) of the Act, and concluded: "This finding is to be deemed a special rule prescribed for the purpose of this proceeding . . ." 1 M.C.C. at p. 443. The holding of the Peninsula case, *supra*, was followed in the other two cited cases as well as in other Commission decisions too numerous to list. See *Interstate Commerce Act Annotated* Vols. 10-17, § 208(c).

[23] There was never any doubt in the minds of the practitioners in the proceeding before the Commission that the application of the

certificate should be restricted against all charter rights; what was needed and wanted was a restriction or "special rule" preventing the Railroad from originating special or charter parties at Washington, D. C.,[2] a power which the Commission for many years consistently has recognized. In the instant case, however, the Commission ignored this power and dismissed the arguments and evidence relating to the detrimental effect to be visited upon existing Washington based carriers by further inroads upon their charter and special operations, by stating that the existence of such inroads and the evidence thereon is "immaterial." (J.S. 20a). The Railroad offered no evidence in opposition.

The evidence which the Commission rejected as immaterial discloses that Safeway Trails, in common with numerous other Washington based carriers, and indeed with carriers all over our nation, in the public interest operates a number of regular routes at a deficit and that it is able to do so only by virtue of its revenues derived from special and charter runs. Further inroads upon these essential revenues are shown by the record herein to be destructive of some of those needed services now offered by existing carriers. Safeway Trails itself operates over several routes which do not produce revenues sufficient to defray their costs of operation. However, because of apparent public need, Safeway Trails continues their operation with revenues derived from special and charter services, most of which originate at Washington, D. C.; and it was only

Railroad merely was a subterfuge to obtain Washington based charter rights. Although the Railroad never denied this contention the Commission found it to be immaterial (J.S. 13a, 20a, 22a)

[2] J.S. 8a, 12a, 16a.

as to those charter and special services originating in Washington that Safeway Trails sought restriction. Any thoroughly experienced practitioner before the Commission readily should concede that the Commission since before the Peninsula case cited above, always has deemed itself empowered to limit points of origin of special and charter service, although it never has recognized a similar power over their destination.

It is this interpretation which the Commission for almost 25 years consistently has followed and not that interpretation suggested by the District Court and appellees herein who for the purpose of this case refuse to recognize a distinction between restrictions as to origin and restrictions as to destination.[25] This is but another instance in which the opinion of the District Court fails to confront the issues raised by Safeway Trails which should be resolved on this appeal.

The substantiality of this issue is evidenced by the numerous petitions by the Commission and others to the Congress as cited by the District Court (J.S. 6a), the Railroad's motion to affirm (p. 8), as well as by the motion of the Commission (p. 6).

[25] The only reason certificated carriers now may originate charter or special service at any terminal point along their line is because of Rule III 8f the Commission's General Rules and Regulations Governing Special or Chartered Party Service, established in *Regulations Governing Special or Charter Party Service*, supra; the Commission reserves the right in any given case to enter a *special* rule contrary to these *general* rules.

3. THE FINDINGS AND THE EVIDENCE

a. Fort George G. Meade

On page 3 of its motion to affirm, counsel for the Railroad states that the Commission restricted the Railroad from serving the National Security Agency. This is an incorrect statement; the Commission imposed no such restriction upon the Railroad. Instead the Commission found: "No evidence was presented by applicant with respect to the proposed service to the National Security Agency, therefore, that part of the application should be denied." (J.S. 32a).[26] But this was not the only point concerning which the Railroad offered no evidence, for it offered none with respect to service to Fort Meade, and that part of the application also should have been denied.

On pages 10 and 11 of its motion, the Railroad reviews the witnesses presented by it and the service area covered by their testimony. Despite this exaggerated review, the Railroad still fails to point to a single witness or to the slightest fragment of evidence of need for additional Fort Meade service. The best the Railroad has to offer in its motion by way of evidence of record indicating public need for additional Fort Meade service, is the argument that the District Training School is located within Fort Meade, and since there is evidence of record supporting its contention as to the District Training School, that this is sufficient to include Fort Meade, and that in any event the Com-

[26] This conclusion is found in the report of the Joint Board and was not excepted to by the Railroad (J.S. 9a). Inasmuch as the National Security Agency (NSA) is located within the Fort Meade military reservation, the Railroad still could serve it under the unrestricted grant to serve Fort Meade; upon the representations of the Railroad, however, the District Court held otherwise, and Safeway Trails is content to rest upon this holding.

mission was not required to make a finding as to every stop along the Railroad's proposed route.

The argument is totally facitious and untrue. The District Training School is not located on the Fort Meade reservation but rather is located off of U. S. Route 602 before the entrance of Fort Meade is even reached; its geographic area extends from one quarter of a mile to a mile away from the highway and from Fort Meade. The fact is that the Railroad solicited testimony from the experienced transportation officer of Fort Meade, Colonel Mason, who refused to support the Railroad's case for the simple reason that the Railroad wanted him to testify as to need for additional Fort Meade service and he knew there was no such need.

To argue that the Commission was not required to make a finding as to the need for additional Fort Meade service[27] is to ignore the fact that Fort Meade is the terminal point on Safeway's line and the most important stop on its run; that although Safeway's service is operated at a loss, what revenues it does obtain from this run come mostly from Fort Meade.

Throughout the proceedings before the Commission and then before the District Court, Safeway Trails consistently has argued that service by a new carrier was not needed at Fort Meade. The statement of counsel for the Commission in footnote 4 (page 7) of its motion to affirm that this contention was not raised before is utterly untrue. Counsel goes even further in this same footnote and claims that the Commission did discuss the inadequacy of service to Fort Meade and points to the reports of division 1 and of the Joint

[27] Railroad's motion page 11.

Board, citing J. S. 8a, 9a, 10a-11a, 12a-13a, 29a-30a, 32a-33a. But these pages say no such thing, and it is untrue and, thus, improper to claim otherwise. It would appear that in citing these pages and making the argument thereon, someone thumbed through the appendices of Safeway Trail's Jurisdictional Statement and copied down a page number every time the name Fort Meade appeared; the references reflect cavalier disregard for the truth and a callus ignorance of the content of the record.[28]

b. The District Training School

Fort Meade was one of the proposed service points of which Safeway Trails complained. The other service point complained of was the District Training School. The record demonstrates that Safeway Trails, ever since the school opened a few years ago, has sought without success cooperation from the school authorities to ascertain the transportation needs of the school. Not until the first hearing before the Commission in the instant case were these needs crystalized, whereupon Safeway Trails promptly enlarged its service specifically to meet the alleged needs. As found by the Joint Board, witnesses employed by the school testified of a need for transportation to and from Washing-

[28] J.S. 32a-33a cited in the Commission's Motion to Affirm states "Applicant (Railroad) holds authority to operate between Glen Burnie and Fort George G. Meade and what it is here seeking is authority to operate between Washington and Fort George G. Meade including intermediate points between the latter points and Laurel to render a through service between Washington and Glen Burnie." The Railroad at no time made any effort to offer proof as to Fort Meade service, because Fort Meade was merely an unimportant point along its proposed line at which it could not hope to stimulate new business not presently being carried by Safeway Trails.

ton and the Training School to meet the school work shifts of 6:30 a.m. to 3:00 p.m., from 10:45 p.m. to 6:45 a.m., and from 2:30 p.m. to 11:00 p.m. (J.S. 27a). Bus service for Sunday visiting hours of 1:00 to 4:00 p.m. also was said to be needed (J.S. 28a). Safeway Trails promptly enlarged its service by adding schedules "... leaving Washington at 5:30 a.m., 1:35 p.m. and 9:50 p.m., daily and 1:45 p.m. on Sunday and returning to Washington ... at 7:15 a.m., 3:20 p.m., and 11:30 p.m., daily and 4:15 p.m., on Sunday." (J.S. 30a) These schedules depart Washington from the centrally located Trailways Terminal[29] and proceed out New York Avenue, Northwest to the school picking up passengers along the way and return over the same route. The passengers are deposited and board not on the highway in front of the school but rather directly in front of the buildings in which they work, for the buses of Safeway Trails actually enter the school grounds in a manner exactly as requested by the witnesses.

By its petition for reconsideration by the entire Commission, Safeway Trails pointed to these facts and asked the Commission to reconsider the determination of its division 1 which found the existing service to the District Training School to be inadequate. Safeway argued that although the service may have been unsatisfactory at one time, nevertheless, it is not inadequate now and indeed is designed to satisfy the needs of the school as testified to by its employees. In its opinion on the petition for reconsideration the Commission stated

[29] The Trailways Terminal is located at 12th and New York Avenue, Northwest. The Railroad proposed to terminate its schedules at 16th and K Streets, Northwest, which is a considerable distance from the homes of these witnesses.

that it would restate the facts ". . . only to the extent necessary for a clear understanding of the issues." (J.S. 16a) Although the Commission thoroughly restated the Railroad's evidence as to the need for additional service to the District Training School, it failed to mention one word of the specially designed service of Safeway Trails. By its own admission, then, the Commission on reconsideration failed to consider the evidence of Safeway Trails in conjunction with that offered by the Railroad. The Commission failed to consider the evidence of Safeway Trails which so effectively detracted from the evidence of the Railroad, and in this failure the Commission acted in an unfair and unreasonable manner. As was held in *Universal Camera Corp.* v. *National Labor Relations Bd.*, 340 U.S. 474 (1950), the Court is precluded from sustaining an order merely on the basis of evidence which in and of itself justifies it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn. This, the District Court failed to do.

Safeway Trails contends that the Commission possesses no jurisdiction permitting the indiscriminate granting of operating rights to competing carriers over identical routes. Before the operation of an existing carrier may be permitted to be duplicated by another carrier, the Commission first must make an appropriate jurisdictional finding that the existing service fails through inability or otherwise to respond to the public needs and Universal Camera, *supra*, requires that such a finding be based on substantial evidence as defined therein. In the instant case the Commis-

sion failed to make such a jurisdictional finding as to Fort Meade, although specifically requested by Safeway Trails to consider and make a finding upon the conflicting evidence thereon. The finding as to inadequacy of existing service to the District Training School is not supported by substantial evidence. The action of Safeway Trails in enlarging its service to the school to satisfy an alleged increase in need, reflects its willingness and ability to adjust its service in accordance with public need and should not have been ignored by the Commission on reconsideration.

CONCLUSION

The record made before the Commission is very short and hearings were held which lasted only two days. But the issues which this Court is asked to resolve are very large and are of vital importance to Safeway Trails and to the industry generally. The terse and casual treatment accorded these issues by the motions to affirm reflect the lack of understanding and appreciation by counsel for the United States and the Commission as well as for the Railroad of their vital and substantial nature. The likelihood of success by Safeway Trails on this appeal is great.

The issues as to through routes and charter and special service are issues of first impression for this Court and for the federal courts generally. The issue as to the findings and evidence reflect the failure of the District Court to understand or correctly apply the well established rules thereon. Because of the substantiality of all the issues raised by this appeal, we

respectfully pray the motions to affirm be denied and ask that probable jurisdiction be noted.

Respectfully submitted,

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